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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 349.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY OF TEXAS, PLAINTIFF IN ERROR,

vs.

MOLLIE F. FERRIS, MATTIE LEE, SAM. RICHARD FERRIS, PRICE FRANKLIN FERRIS, MINA KATIE FERRIS, MILLIE CALDONA FERRIS, HENRY CORDELL FERRIS, DOVIE EMELINE FERRIS, AND LOVIE EVELINE FERRIS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED JULY 18, 1900.

(17,834.)

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IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

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Caption.

1

THE STATE OF TEXAS, }
County of Bastrop. }

At a term of the district court begun and holden within and for the county of Bastrop, at Bastrop, on the 19th day of June, A. D. 1899, and which adjourned on the 18th day of July, A. D. 1899, the Hon. Ed. R. Sinks, judge thereof, presiding, the following cause came on for trial, to wit:

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY of Texas. } No. 1884.

Plaintiffs' First Amended Original Petition.

Filed June 19th, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, to June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY OF Texas. } No. 1884.

Come now the plaintiffs in the above entitled and numbered cause, by their attorneys, and with leave of the court first had and obtained filed this their first amended original petition in lieu of and as a substitute for their original petition, filed herein on January 31, 1899.

THE STATE OF TEXAS, }
Bastrop County. }

In the District Court, to June Term, 1899.

To said court:

Mrs. Mollie F. Ferris, who sues herein for her own use and benefit and for the use and benefit of Mrs. Mattie Lee (formerly Ferris) and Sam. Richard Ferris, Price Franklin Ferris, Mina Katie Fer-
2 ris, Millie Caldonia Ferris, Henry Cordell Ferris, Dovie Emeline Ferris, and Lovie Eveline Ferris, who are minors without any lawful guardian of their persons and estate and who sue herein by their mother and next friend, Mrs. Mollie F. Ferris, plaintiffs, complaining of The Missouri, Kansas and Texas Railway Company of Texas, which will be hereinafter styled defendant, represents—

That plaintiff Mollie F. Ferris is the surviving wife of James Ferris, deceased, and Mrs. Mattie Lee, Sam. Richard Ferris, Price Franklin Ferris, and Mina Katie Ferris are children of said deceased by a former marriage, the wife of said marriage being dead, and Millie Caldonia Ferris, Henry Cordell Ferris, Dovie Emeline Ferris,

and Lovie Eveline Ferris are children of said deceased by plaintiff Mollie F. Ferris, they having been married on, to wit, the 10th day of January, 1894, the first two of said children having been born prior to the death of their father, and the other two having been born since his death, and all said plaintiffs reside in Bastrop county; that defendant is a private corporation, duly incorporated, owning and operating a line of railway extending from Houston, in Harris county, through Bastrop county to Denison, in Grayson county, in this State, the town of Smithville being a station on said railway, and J. J. Carson being the local agent of defendant at Bastrop, also a station on said railway, in said Bastrop county.

That in the said town of Smithville are a public street of the said town and public county road which run east and west, crossing defendant's railway about two hundred yards north of its passenger depot, and the said public street and public road are used and have been for many years by the general public with the full knowledge, consent, and acquiescence of defendant, and on, to wit, January 28, 1899, the said James Ferris, who was then in life, while in a wagon drawn by a team of animals driven by one Cass Ferris and while crossing defendant's railway at the said public street and road crossing over the same was struck upon the said crossing by a south-bound passenger train of defendant and was then and there instantly killed.

That the deceased was struck and killed, as aforesaid, by the negligence and carelessness of defendant, its servants and employés, in this: That it permitted trees and undergrowth and other
3 obstacles to be upon its right of way, which obstructed the view of persons going over said crossing from east to west of a train approaching the same on defendant's railway from the north and obstructed the view of the said Cass Ferris and deceased of the approach of the train which collided with the wagon in which they were, as aforesaid, or, if there were no such obstacles upon said right of way, then there were such along and adjacent to the same which obstructed the view of persons traveling in such direction of a train approaching from the north and obstructed the view of the said Cass Ferris and deceased of the said train which struck them; that it failed to keep that portion of its road-bed and right of way over which the said public street and public county road ran, as aforesaid, in proper condition for the use of the traveling public, in that the approach to the said crossing from the east was too steep and too narrow, with the consequence that it was with difficulty a team of the size and strength of the one drawing the said wagon could draw an empty wagon over the said crossing, and that if a train were discovered to be coming after entering upon the said approach a team and wagon could not be turned round thereon so as to escape from such train, and it was with great difficulty that the said team could draw the wagon over the said crossing; that it allowed one of its locomotives to stand on one of its sidings south of the said crossing and near the same and steam and smoke to escape therefrom, which made a loud noise, and which engine and steam and smoke and noise were calculated to alarm teams drawing wagons over the said crossing and did alarm the team drawing the wagon in which

deceased was and caused said team to misbehave and to hesitate about going over the crossing, and an employé of defendant, namely, one C. Reese, further caused the said team to misbehave and hesitate about going over the said crossing by waiving a hat in front of the said team and hallooing in a loud voice, and in consequence of his act and of the fright of the said animals at the said locomotive the passage of the said wagon over the said crossing was
4 delayed; that on account of the nearness of the said locomotive to the said crossing and the alarm of the team thereat the attention of the deceased and the said Cass Ferris, the driver, was drawn to the said locomotive and to the said team, and that a strong wind was blowing, which deadened the sound of the approaching of the said train; that the said town of Smithville at said time and long prior thereto was and had been incorporated as a town of more than one thousand inhabitants, under title 17 of the Revised Statutes of Texas of 1879 (which in the present revision is title 18), and at said time there was in force in said town and within the corporate limits thereof an ordinance which made it unlawful for an engineer, conductor, or other person in charge of any railroad train, car, or locomotive to run the same at a greater rate of speed than six miles per hour within the said limits, and punished any violation of said ordinance by a fine of not less than ten nor more than fifty dollars, which is article 159, contained in the Book of Revised Ordinances of the said town of Smithville, of date February, 1898, printed and published by authority of the city council of said town, a copy of which book is filed herewith, and reference is made to the said article, and the same is asked — taken and considered as a part hereof; and at said time there was in force in the said town an ordinance which required a bell and a steam whistle to be carried on each locomotive engine passing through the said town, and required that the whistle should be blown and the bell rung at a distance of at least eighty rods from the place where the railroad crossed any public street of the town, and required that such bell should be kept ringing until the engine should cross such public street or stop, and punished any engineer or other person having charge of a locomotive engine who failed to comply with the said ordinance by fine of not less than five nor more than one hundred dollars, which is article 160, contained in the said Book of Revised Ordinances, and reference is here made to the said article, and the same is asked to be taken and considered as a part hereof; and the engineer, namely, John Pepple; the fireman, namely, John Slocum, and the conductor, namely Tom Murphy, in charge of said train, did not sound the whistle on the engine drawing the said train at a distance of eighty rods from the said cross-
5 ing, and did not begin to ring the bell thereon at that point and continue to ring the same until the said crossing was passed, as required by said article 159 and by the statutes of this State, and they ran the said engine and train within the corporate limits of said town and while approaching and passing over said crossing at a greater rate of speed than six miles per hour, to wit, thirty-five miles per hour, and the rate of speed at which they ran

the said train was excessive and dangerous to persons using the said crossing and was greater than a man of ordinary prudence would have run the same under similar circumstances, and they failed while approaching the said crossing to keep the lookout to discover persons upon or about to enter upon said crossing that a man of ordinary prudence would have done under similar circumstances, or if they did keep such lookout they discovered the said wagon and team and occupants of the wagon and wholly failed to use the means at their command for warning deceased and the other persons in the wagon of the approach of the train, and wholly failed to use the means at their command for stopping the train and avoiding the collision, or at least of slackening the speed and lessening the force of the collision; that by the sudden, rapid, and unexpected approach of said train, as aforesaid, and the great menace of the same to their lives and limbs there was produced in the minds of the deceased and the said Cass Ferris an overpowering sense of terror, and they were deprived of the power of rational action, and that the said engineer, fireman, and conductor and the other train employés discovered the peril to which the deceased and the other occupants of the wagon were exposed, and that they and each of them after discovering such peril failed to use the care and caution that a person of ordinary prudence would have done to avert the collision under the circumstances, or at least to reduce the speed of the train and break the force of the collision.

That the deceased was aged, to wit, forty years, and was a farmer by occupation; that he was a kind, devoted, and affectionate husband and father; was sober and industrious and in good health and strength; that he earned on an aveage of one thousand
6 ($1,000.00) dollars per year, which he devoted to the support and maintenance of his said wife and to the support, maintenance, and education of his said children; that plaintiffs have no estate or property, and that they were wholly dependent upon said deceased for maintenance and support, and the children were dependent upon him for education; that the deceased was a man of good habits and example, and that his advice and example to his said children would have been of great pecuniary benefit and value to them, and that by reason of his said death the plaintiffs have been damaged in the sum of thirty thousand ($30,000.00) dollars.

Premises considered, plaintiffs pray that the defendant be cited according to law to answer this petition; that on final trial they have judgment for their said damages, to be apportioned among them by the jury, for costs of suit, and for general relief; and they will ever pray.

S. L. STAPLES AND
JOHN W. PARKER,
Attorneys for Plaintiffs.

Filed June 19, 1899.
R. J. GRIESENBECK, *Clerk.*

Defendant's Original Answer.

Filed June 20th, 1899. R. J. Griesenbeck, Clerk.

In District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE B. FERRIS ET AL. vs. THE M., K. & T. R'Y CO. OF TEX. } No. 1884.

Herein comes the defendant and demurs generally to plaintiffs' first amended original petition and says the same is wholly insufficient in law, and of this it prays the judgment of the court.

ORGAIN & GARWOOD,
Attorneys for Defendant.

Answering, defendant tenders the general issue, denies generally each and every allegation in plaintiffs' said first amended petition contained, and says that it is not guilty of the said supposed wrongs and trespasses by plaintiff- alleged or either of them; and of this it puts itself upon the country.

ORGAIN & GARWOOD,
Attorneys for Defendant.

Further answering, this defendant says:

1. That the negligence of plaintiffs' deceased, James Farris, directly and proximately contributed to his said death, in this: That he, the said James Ferris, by long use and acquaintance, was thoroughly familiar with said railroad crossing where the said accident herein complained of occurred and with the times at which defendant's regular passenger trains were due thereat, and then and there at the time of the said collision did then and there well know that defendant's said south-bound passenger train was due and expected at said crossing, which, as alleged, is about 507 feet from defendant's passenger depot at Smithville; that he approached said crossing by driving up what is known as Front street, in said town of Smithville; that for a distance of 400 yards or more as he drove along said Front street in an open wagon drawn by two horses, in company with said Cass Ferris and Wm. Ashley, he had a plain, clear, and absolutely unobstructed view of defendant's track from the crossing where the collision occurred northwards for more than 600 yards, whereby by the slightest diligence a train approaching said crossing from the north could be seen and heard at every instant from the time it came within 600 yards of said crossing by any person approaching same along Front street from the south for more than 400 yards; that thus as *defendant* approached said crossing from the south he had for 1,000 yards a plain, clear, and unobstructed view of defendant's track from said crossing for at least 600 yards northwards; that on and at said crossing and the approaches thereto he had the same clear and unobstructed view thereof; that it was wholly impossible for plaintiff to approach said crossing on the route actually pur-

sued by him at the time herein enquired about to use his senses of sight and hearing without seeing and hearing a train approaching from the north and having full opportunity to guard against all
8 possible danger; that nevertheless the said James Ferris negligently and recklessly approached said crossing in a state of intoxication from the negligent and reckless use of intoxicating liquors, and did then and there wholly fail to stop or look or listen as he approached said crossing, and wholly failed to use his senses, either of sight or hearing, to ascertain and guard against an approaching train, and did then and there recklessly and negligently attempt to cross defendant's railway track in front of an approaching train, which he either saw or by the use of ordinary care and diligence might have seen and heard in ample time to have avoided all danger; that in so doing he wholly failed to use such ordinary care as an ordinarily careful and prudent man would under similar circumstances, and that his said negligence directly and proximately contributed to his own injury. Wherefore defendant pleads the contributory negligence of the said James Ferris in bar of this suit.

2. And defendant further says that at the time of the collision herein enquired about he, the said James Ferris, was engaged with the said Cass Ferris and one Wm. B. Ashley in the common and joint enterprise of driving an open wagon drawn by two horses to their respective homes; that all were in the forward part of the wagon, and each was advising, assisting, and controlling the other in the management, direction, and control of said team and in doing said driving; that all three were intoxicated and so far under the influence of intoxicating liquors that they and each of them were wholly incapacitated for driving said wagon and controlling said team in a prudent and careful manner; that the intoxicated condition of each was fully known to the other before and at the time they started on their way to such crossing, and that their said intoxicated condition was not known to defendant at any time at or before the accident; that either the said Cass Ferris or the said Wm. Ashley or said James Ferris were driving the team; that all three, by reason of their intoxicated condition, were attempting to take part in the driving and direction and control of said team and wagon; that they and each of them were thoroughly familiar with said crossing and with the fact that this south-bound passenger train was due at said crossing at said time; that they approached
9 said crossing by driving northwards along Front street for about 400 yards; that through said entire distance they and each of them had a clear and wholly unobstructed view of defendant's track from the crossing for more than 600 yards, whereby a train approaching said crossing from the north could by the slightest care have been seen at every instant from the time it came within six hundred yards of said crossing by any person approaching said crossing for 400 yards along said Front street; that thus for more than 1,000 yards to the north the defendant's track was in full view of the said Cass Ferris, Wm. Ashley, and James Ferris, and each of them, as they approached said crossing; that by the use of ordinary

care they and each of them could have both seen and heard said approaching train at any point along said entire route of 400 yards along Front street, the same being south of said crossing; that as they reached said crossing they had a clear and unobstructed view of defendant's track for a distance of at least 600 yards to the north thereof; that also to the south there was a clear and unobstructed view for about 500 yards, there being no obstructions of any nature at or near the same; that by the use of ordinary care and diligence they and each of them could have seen and heard said approaching train in ample time to have avoided all danger; that nevertheless they and each of them negligently and recklessly failed to stop or to look or to listen for approaching train before driving onto the said crossing, but they, the said James Ferris, Cass Ferris, and Wm. Ashley, each being then and there under the influence of intoxicating liquors, did then and there each individually and all collectively urge and whip the horses drawing said wagon upon the said crossing immediately in front of said south-bound passenger train, which they and each of them either saw or by the use of ordinary care could have seen and heard; that in so doing they and each of them failed to use ordinary care and diligence, which negligence contibuted proximately and directly to the injury herein complained of; that the said James Ferris having then and there taken passage with the said Cass Ferris and Wm. Ashley, each of whom he then and there well knew to be intoxicated and so far under the influence of spirituous liquors as to render them incapable of prudently driving said wagon, and having then and there committed himself to their management and control, and being then and there engaged in a joint and common enterprise with them, the said Cass Ferris and Wm. Ashley, and being then and there engaged in assisting the said Cass Ferris and Wm. Ashley in the management, control, and direction of said wagon and team in the manner and form aforesaid, the said negligence of the said Cass Ferris and Wm. Ashley and of each of them is imputable to the said James Ferris, and defendant now here pleads the said contributory negligence of said Cass Ferris and Wm. Ashley, jointly, and each of them severally, and the joint negligence of said Cass Ferris, Wm. Ashley, and James Ferris, as well as the individual negligence of him, the said James Ferris, in bar of this suit.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Filed June 20, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge of Court.

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY of Texas. } No. 1884.

GENTLEMEN OF THE JURY: This is an action by Mollie F. Ferris, as surviving wife of James Ferris, deceased, for her own use and benefit and for the use and benefit of Mattie Lee, a child of said deceased, and Sam. Richard Ferris, Price Franklin Ferris, Mina Katie Ferris, Millie Caldonia Ferris, Henry Cordell Ferris, Dovie Emeline Ferris, and Lovie Eveline Ferris, also children of deceased by Mollie F. Ferris, as next friend, against the Missouri, Kansas and Texas Railway Company of Texas for actual damages in the sum of thirty thousand ($30,000) dollars, alleged to have been sustained by plaintiffs on account of the death of the said James Ferris, which
11 is alleged to have been caused by the negligence and carelessness of defendant, by running one of its passenger trains against a wagon in which he was at a public crossing over its railway in the town of Smithville on January 28th, 1899.

The plaintiffs allege the negligence of defendant, which it is claimed caused the death of James Ferris, to be that there were brush and trees and other obstacles adjacent to the right of way on the east side of the railroad and north of the crossing, which obstructed the view of the deceased and Cass Ferris, who was driving the wagon, of the approaching train; that the approach to the crossing on the east was too steep and too narrow, with the consequence that a wagon could not be turned round thereon, so as to escape from an approaching train; that it allowed one of its locomotives to stand on one of its sidings south of the crossing and near the same, from which steam and smoke escaped, making a noise, and that such engine and steam and smoke and noise were calculated to alarm teams drawing wagons over the said crossing, and did alarm the team drawing the wagon in which deceased was, and caused said team to misbehave and to hesitate about going over the crossing, and that in consequence of the fright of the said animals at the said locomotive the passage of the said wagon over the crossing was delayed; that on account of the nearness of said locomotive to the crossing and the alarm of the team thereat the attention of the deceased and said Cass Ferris was drawn to the said locomotive and the said team; that the employés of defendant in charge of said train while approaching and passing over said crossing ran the said train at a rate of speed which was excessive and dangerous to persons using the said crossing, and was greater than a man of ordinary prudence would have run the same under similar circumstances; that they failed, while approaching the said crossing, to keep the lookout to discover

persons upon or about to enter upon said crossing that a man of ordinary prudence would have done under similar circumstances, and that the said employés in charge of said engine and train did not sound the whistle on the engine at a distance of at least eighty rods from the said crossing, and did not begin to ring the bell
12 thereon at that point and continue to ring the same until the said crossing was passed.

The defendant answers by general denial and specially that the negligence of the deceased, James Ferris, directly and proximately contributed to his death, in that he was well acquainted with said crossing, and had a plain, clear, and unobstructed view of the defendant's railway for more than six hundred yards northwards of the crossing on which he was crossing, and that it was wholly impossible for him to approach said crossing on the route actually pursued by him without seeing and hearing the approaching train by the use of the senses of sight and hearing, and that he had full opportunity to guard against all possible danger; that said deceased negligently and recklessly approached said crossing in the state of intoxication and in the negligent and reckless use of intoxicating liquors, and did then and there wholly fail to stop or look or listen as he approached said crossing, and wholly failed to use his senses, either of sight or hearing, to ascertain and guard against an approaching train, and did then and there recklessly and negligently attempt to cross defendant's railway track in front of the approaching train, which he either saw or by the use of ordinary care and diligence might have seen and heard in ample time to have avoided all danger; that in doing so he wholly failed to use such care as an ordinarily careful and prudent man would under similar circumstances, and that his said negligence directly and proximately contributed to his own injury.

Defendant further specially pleads that at the time of the collision the said James Ferris, deceased, was engaged with Cass Ferris and William B. Ashley in the common and joint enterprise of driving a wagon drawn by two horses to their respective homes; that all were in the forward part of the wagon, and each was advising, assisting, and controlling the other in the management, direction, and control of said team and in doing said driving; that all three were intoxicated and so far under the influence of intoxicating liquors that they and each of them were wholly incapable of driving said wagon
13 and controlling said team in a prudent and careful manner; that the intoxicated condition of each was known to the other before and at the time they started on their trip to said crossing, and that their said intoxicated condition was not known to defendant at any time at or before the accident; that either the said Cass Ferris or the said William Ashley or the said James Ferris was driving the team; that all three, by reason of their intoxicated condition, were attempting to take part in the driving, direction, and control of said team and wagon, and they and each of them were thoroughly familiar with said crossing, and with the fact that the said passenger train was due at said crossing at said time; that they approached the crossing driving northwards along Front street for

about four hundred yards, and that for said entire distance they and each of them had a clear and wholly unobstructed view of defendant's track over the crossing for more than six hundred yards, whereby a train approaching said crossing from the north could by the slightest care have been seen at every instant from the time it came within six hundred yards of said crossing; that for more than one thousand yards to the north the defendant's track was in full view of the said Cass Ferris, William Ashley, and James Ferris and each of them as they approached the crossing; that by the use of ordinary care they and each of them could have both seen and heard said approaching train at any point along said entire route of four hundred yards along Front street, the same being south of said crossing; that as they reached said crossing they had a clear and unobstructed view of defendant's track for a distance of at least six hundred yards to the north thereof; that by the use of ordinary care and diligence they and each of them could have seen and heard the approaching train in ample time to have avoided all danger; that nevertheless they and each of them negligently and recklessly failed to stop or look or listen for an approaching train before driving onto the said crossing, but that they, each being then and there under the influence of intoxicating liquors, did then and there individually and all collectively urge and whip the horses drawing said wagon upon the said crossing immediately in front of the said train, which they
14 and each of them either saw or by the use of ordinary care could have seen and heard, and that in doing so they and each of them failed to use ordinary care and diligence, which negligence contributed directly and proximately to the injury and death of said James Ferris; that the said James Ferris having taken passage with the said Cass Ferris and William Ashley, each of whom he then and there well knew to be intoxicated and so far under the influence of spirituous liquors as to render them incapable of prudently driving said wagon, and having then and there committed himself to their management and control, and being then and there engaged in the common and joint enterprise with them, and being then and there engaged in assisting them in the management, direction, and control of said team and wagon in the manner and form aforesaid, the said negligence of the said Cass Ferris and William Ashley and of each of them is imputable to the said James Ferris, and defendant pleads the said contributory negligence of the said Cass Ferris and William Ashley, jointly and of each of them severally, and the joint negligence of said Cass Ferris, William Ashley, and James Ferris, as well as the individual negligence of the said James Ferris, in bar of plaintiffs' right to recover.

As the law of this case you are instructed:

(1.) By the terms "negligence," as used in this charge and in any special instructions that may be given you, is meant the doing of that which a person of ordinary care and prudence would not have done under the same or similar circumstances, or the failure to do that which such a person would have done under such circumstances.

(2.) By the term "ordinary care," as used in this charge and in any special instructions that may be given you, is meant such degree of care as a man of ordinary prudence would exercise under the same or similar circumstances.

(3.) It was the duty of the defendant company in running its engine and train up to and over the crossing in question to exercise ordinary care to avoid striking any person or persons who might be upon the said crossing, and it was equally the duty of the deceased, James Ferris, in approaching the said crossing to exercise ordinary care to avoid being struck by any such engine and train.

(4.) The proof shows that on, to wit, January 28, 1899, a wagon, drawn by a team, in which the deceased, James Ferris, one Cass Ferris, and one William B. Ashley were riding, while passing over the public road crossing north of defendant's passenger depot in Smithville, was struck by a south-bound passenger train of defendant company and the said James Ferris then and there killed. Now, if you believe from a preponderance of the evidence that there was brush along and adjacent to the right of way north of the crossing, which obstructed the view of persons approaching the crossing from the east of a train approaching the crossing from the north; that defendant company allowed one of its locomotives to stand on one of its sidings south of said crossing and near the same, and that steam and smoke escaped therefrom, making a noise; that such engine and steam and smoke and noise were calculated to alarm teams drawing wagons over the said crossing, and did alarm the team drawing the wagon in which deceased was and caused said team to misbehave and to hesitate about going over the crossing, and thereby delayed the passage of the wagon over the same; that on account of the nearness of said locomotive, if it was near, to the crossing and the alarm of the team thereat, if you believe it became alarmed thereat, the attention of the deceased and the said Cass Ferris, the driver, and the said William B. Ashley was drawn to the said locomotive and to the said team, and you further believe from such preponderance of the evidence that under such circumstances the employés of the defendant company in charge of the said train ran said train up to and over the said crossing at a rate of speed that was excessive and dangerous to persons using the said crossing, and was greater than a man of ordinary prudence would have run the same under such or similar circumstances, and you believe that such excessive and dangerous rate of speed, if you find the same was excessive and dangerous, under the circumstances, was the direct and proximate cause of the striking of the wagon and killing of the said James Ferris, or if you believe from a preponderance of the evidence that the engineer and fireman, while approaching the said crossing, failed to keep the lookout to discover persons upon or about to enter upon the said crossing that a man of ordinary prudence would have done under the same or similar circumstances, and that the failure to keep such a lookout, if there was such failure, was the direct and proximate cause of the striking of the wagon and killing of deceased, or if you believe from a prepon-

derance of the evidence that said employés who were charged with that duty did not sound the whistle on the engine drawing the said train at a distance of at least eighty rods from the said crossing, and did not begin to ring the bell thereon at that point and continue to ring the same until the said crossing was passed, and that such failure to sound the whistle and ring the bell, if there was such, was the direct and proximate cause of the striking of the wagon and killing of deceased, you will find a verdict for plaintiffs unless you find a verdict for the defendant under the instructions hereinafter contained or that may be contained in any special charges given you.

(5.) If, however, you believe from a preponderance of the evidence that the said James Ferris, in approaching the said crossing in the wagon, failed to look and listen for an approaching train, and you believe that a man of ordinary care would have looked and listened under the circumstances for a train before entering upon said crossing and railway, and that his failure to look and listen directly and proximately contributed to the striking of the wagon and his death, you will find a verdict for the defendant, and this, too, though you may believe the defendant did not use ordinary care in running its said train up to and over said crossing.

(5½.) If you believe from the evidence that the defendant failed to blow the whistle at least eighty rods from the crossing and ring the bell until the train passed over the crossing, or that the defendant was guilty of any other act of negligence complained of, still, if you believe from the evidence that said James Ferris in approaching and going on said crossing was guilty of negligence which contributed to his injury, then you will find for the defendant.

17 (6.) Also if you believe from a preponderance of the evidence that the deceased and Cass Ferris and William B. Ashley were engaged in the common and joint enterprise of driving the wagon and team—that is, that each was advising and assisting the others in the management, direction, and control thereof—then the want of care of each, if any, would be imputed to the other; and if you believe from such preponderance of the evidence that either of them failed to look and listen for an approaching train, and that under the circumstances a man of ordinary care would have looked and listended for such train before driving upon the crossing, and that such failure to look and listen, if they and each of them failed to look and listen, directly and proximately contributed to the collision and the killing of said James Ferris, or if you believe from such preponderance of the evidence that the deceased, James Ferris, was in a state of intoxication and in approaching said crossing failed to look and listen for an approaching train, and you believe under the circumstances that a man of ordinary care would have looked and listened for such train, and that such failure to look and listen, if you believe he failed to look and listen, directly and proximately contributed to the collision and his death, or, whether you believe he was in a state of intoxication or not, if you believe the said Cass Ferris and William B. Ashley were intoxicated and were engaged together in managing and controlling the said team, or if

you believe the said Cass Ferris alone was managing and controlling the same and was intoxicated, and you believe that the intoxication in either case rendered them together or the said Cass Ferris alone incapable of prudently driving said wagon and team, and that the said James Ferris committed himself to their management and control knowing of such intoxication and incapability, if there were such, then any negligence of the said Cass Ferris and William B. Ashley in the driving of said team, if they were driving it together, or of the said Cass Ferris in the driving thereof, if he alone was driving it, resulting from such intoxication and incapability would be imputed to the said deceased; and if you believe from such preponderance of the evidence that the death of the said deceased

18 was caused by the failure of the said Cass Ferris and William B. Ashley, if they were driving the team, or of the said Cass Ferris, if he alone was driving it, to look and listen for an approaching train, and that a man of ordinary care under the circumstances would have looked and listened before driving upon the crossing, and that such failure to look and listen, if they did fail to look and listen, directly and proximately contributed to the collision and the death of James Ferris, then the negligence, if any, of the said Cass Ferris and William B. Ashley, if they were together driving the team, or the negligence of the said Cass Ferris, if any, if he alone was driving it, would be imputed to said deceased, James Ferris, and the plaintiffs could not recover, and in either of the cases stated you will find a verdict for the defendant, and this, too, notwithstanding you may believe the defendant failed to use ordinary care in running its train up to and over the said crossing.

(7.) In case you shall find a verdict for plaintiffs you will assess their damages at such sum as under the evidence will fairly and justly compensate them for the pecuniary loss, if any, sustained by them by the death of the said James Ferris, and you will apportion the damages among the plaintiffs—that is, state how much each shall receive.

(8.) Should you return a verdict for the plaintiffs you may use the following form, to be written on the back of this charge:

"We, the jury, find a verdict for the plaintiffs against the defendant and assess their damages at the sum of $—, and we apportion the same among them as follows: Mollie F. Ferris, $—; Mattie Lee, $—; Sam. Richard Ferris, $—; Price Franklin Ferris, $—; Mina Katie Ferris, $—; Millie Caldonia Ferris, $—; Henry Cordell Ferris, $—; Dovie Emeline Ferris, $—; Lovie Eveline Ferris, $—."

(9.) If you shall find a verdict for the defendant you may use the following form: "We, the jury, find for the defendant."

(10.) The burden of proof is on the plaintiffs to show by a preponderance of evidence the facts which will entitle them to recover. In the defenses of contributory negligence pleaded by the

19 defendant the burden of proof is upon defendant to establish the same by a like preponderance of the evidence.

(11.) The jury are the exclusive judges of the credibility of the witnesses, the facts proved, and the weight to be given to the testi-

mony, but must receive the law from the court and be governed thereby.

ED. R. SINKS,
Judge 21st Judl District.

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Special Charge Asked by Defendant and Given by the Court.

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 189

MOLLIE F. FERRIS ET AL.
vs.
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY of Texas. } No. 1884.

The defendant asks the court to instrust the jury as follows:

The law does not fix any definite rule as to the rate of speed of trains at crossings, and whether or not any rate of speed would be negligent would depend upon the nature of the locality, the situation of the crossing, the nature of the approach, and all of the facts and circumstances in evidence, and it is for the jury to say, under all the circumstances in evidence, whether or not the servants and agents of the defendant failed to use ordinary care in propelling defendant's train at the rate of speed which was used in approaching the crossing in this case, and if you believe, under all the facts, that they acted with reasonable care and prudence in propelling the train at the rate of speed used by them, then, in that event, no negligence would be inferrable against this defendant from the fact that said train was moving at any particular rate of speed.

ORGAIN & GARWOOD,
Attorneys for Defendant.

20 Given.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 1 *Asked by Defendant and Refused by the Court.*

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant asks the court to instruct the jury as follows:

If an engineer in charge of a locomotive drawing a passenger train see persons or teams approaching or waiting to cross the rail-

road, he is not bound to anticipate that they will attempt to cross in view of the train, and therefore he is not required to check his speed so much as would be necessary to enable them to cross in front of such locomotive.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 2 Asked by Defendant and Refused by the Court.

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL. } No. 1884.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. }

The defendant asks the court to charge the jury as follows:

GENTLEMEN OF THE JURY: You are charged that one in approaching a railroad crossing cannot relieve himself of the care which he must exercise as an ordinarily prudent man upon the pre-
21 sumption that the railway company is going to perform its duty and thereby justify him in going upon the crossing without the exercise of proper care upon his part, and defendant's failure to ring the bell or blow the whistle, or the fact that its train may have been running at a rate of speed which you may consider improper, should you so believe, does not relieve such person of the care which he must exercise as a man of ordinary care and prudence to ascertain if a train is approaching and if it would be dangerous to attempt to make the crossing.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 3 Asked by Defendant and Refused by the Court.

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL. } No. 1884.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. }

The defendant asks the court to instruct the jury as follows:
It is the duty of one approaching a railroad crossing to exercise

the care and prudence that a man of ordinary care would exercise under the same circumstances, and if you should believe that in the exercise of such care it was the duty of James Ferris to have stopped before driving upon such railway, and that he failed to do so, or if you should find that in the exercise of such care it was his duty to look and listen for the approach of a train, and that he failed to do so, and you should find that under all the circumstances he was negligent, and that such negligence contributed to the injury herein complained of, you will in that event return a verdict in favor of the defendant.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

22 Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 4 Asked by Defendant and Refused by the Court.

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL. *vs.* THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant asks the court to charge the jury as follows:

The fact that the attention of deceased, James Ferris, may have been diverted by the switch engine near by or by the misbehavior of the team, and that his attention being drawn thereto he was rendered inattentive to his real danger, does not relieve said James Ferris from the necessity of looking and listening for approaching trains, and although you should believe that his attention was so directed, yet if you further believe that he failed to look or listen for an approaching train, and that under all the circumstances he failed to act with the case that a reasonably prudent man would under the circumstances, and that such negligence proximately contributed to his injury, you will find for defendant.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 5 Asked by Defendant and Refused by the Court.

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL. vs. THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

23 The defendant asks the court to charge the jury as follows: Although you should believe from the evidence that the crossing along and over which deceased, James Ferris, was endeavoring to pass may have been constructed in an improper manner, or that it was not wide enough to permit a team to be turned around after starting on the approach thereto, yet if you should believe that deceased, James Ferris, was acquainted with such crossing and familiar therewith, then it was the duty of the deceased, James Ferris, to have more carefully looked and listened for trains before going upon said approach; and if you believe from the evidence that deceased's view was unobstructed and he saw or could have seen the train approaching before going on the approach to said crossing by looking, it was his duty to do so, and if he failed to look or if he did look and saw the train approaching he cannot be heard to complain of the narrowness of said approach, and if under all the circumstances you believe he failed to use reasonable and ordinary care and diligence to ascertain the approach of said train or in attempting to cross before it he did discover it and under all the circumstances he was negligent, then you are instructed that deceased could not urge the narrowness of such crossing or other defect, if any, as an excuse for his own negligence, and you will find a verdict for the defendant.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 6 Asked by Defendant and Refused by the Court.

Filed June 23rd, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, to June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL. vs. THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant railway company asks the court to charge the jury as follows:

24 The defendant railway company, in addition to the general denial, by which it denies that it has been guilty of any negligence in any of the particulars charged by plaintiffs, or that such negligence, if any, was the cause of the injury complained of, pleads that the deceased, James Ferris, was himself negligent, and that his said negligence contributed directly and proximately to his injuries. This is what is known in law as the defense of contributory negligence, under which you are instructed that even though you should believe that on the occasion herein enquired about the servants and agents of the defendant company were negligent, and that such negligence contributed to the injury of James Ferris, yet if you further believe that the said James Ferris was also negligent, and that his negligence contributed to and co-operated with the negligence of defendant's servants in producing the injury, in that event the plaintiffs cannot recover; in other words, if both parties are negligent and the negligence of each proximately contributes to the injury, there can be no recovery; hence in this case, although you might believe that the agents of defendant were at the time of the collision propelling the train at a rate of speed greater than a prudent man would have done under all the circumstances, or that they failed to ring the engine bell or blow the whistle, as required by statute, or failed to use ordinary care in any of the particulars set out in this charge heretofore given you, or that such agents were guilty of all of said acts and omissions, and that under all the facts and circumstances of the case they were negligent, and that such negligence directly contributed to the injury of said James Ferris, yet if you should further believe that the said James Ferris was familiar with the crossing and its approaches; that he knew that this particular train was due at said crossing at or about the time it did reach there; that at the time he was so far under the influence of intoxicating liquor as to be incapable of prudent action; that at the time they approached said crossing Cass Ferris and Wm. Ashley were under the influence of liquor to such an extent as to render them unable to prudently drive and direct a team and wagon, and that deceased,

25 James Ferris, knew this at the time he embarked in such wagon; that said wagon was open and without cover; that deceased had a clear, plain, and unobstructed view of defendant's track at said crossing and for a long distance to the north and to the south thereof for a long distance before he reached said crossing and on the approach thereto and at said crossing, and that there was nothing to obstruct his view of an approaching train; that by the use of ordinary care he could have seen or heard said train approaching from the north; that he did not look or listen to ascertain whether a train was approaching, or that, if he did see such train approaching, he endeavored to cross in advance thereof, and if you believe that under all the facts in evidence taken together that the deceased, James Ferris, in attempting to pass over said crossing in advance of the approaching engine failed to act with the ordinary and reasonable care and prudence of an ordinarily careful and prudent man under the same circumstances, and that such failure to act with ordinary care proxi-

mately contributed to the injuries of said James Ferris, then, in that event, you will find a verdict in favor of the defendant.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 7 Asked by Defendant and Refused by the Court.

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant asks the court to charge the jury:

If you believe from the evidence that the deceased, James Ferris, saw the engine approaching and nevertheless undertook, in a wagon drawn by a team of two horses, to cross in full view of such
26 train which was then and there in dangerous proximity to such crossing, and that such conduct would constitute negligence upon the part of the deceased, you will find for the defendant, provided such negligence contributed to his injury

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 8 Asked by Defendant and Refused by the Court.

Filed June 23d, 1899. R. J. Griesenbeck, clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant requests the court to charge the jury as follows:

It was the duty of defendant's employees operating the engine which came in contact with the wagon in which deceased, James Ferris, was riding to give signal of its approach by ringing the bell and blowing the whistle at a distance of at least eighty rods from the crossing where the collision occurred. The object of these requirements is to protect travelers in the highway approaching the

crossing, and it is not required that these signals should begin at exactly eighty rods; and if you believe in this case that the whistle on defendant's engine was sounded at a point more than eighty rods distant from the crossing, but at such distance beyond that it could well have been heard at such crossing by a man of ordinary good hearing, this would be a compliance with the law with regard to the blowing of such whistle.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

27 *Charge No. 9 Asked by Defendant and Refused by the Court.*

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant asks the court to charge the jury as follows:

If you believe from the evidence that James Ferris and his companions or either of them saw the approaching train and stopped to permit it to pass by, and that thereafter Cass Ferris or Wm. Ashley, without fault on the part of James Ferris, after seeing such train approaching and without ordinary care, urged the horses on the track in front of the train, and that under all the circumstances the party so urging said horses on the track were negligent and said negligence contributed to the injury, and if you believe that the party so urging said horses onto the track in advance of an approaching train did so because he was under the influence of intoxicating liquor, if you so believe, and was then and there incapable of directing and controlling the team and wagon as a man of ordinary care and prudence should, and that the said Ferris knew such facts before taking passage on such wagon and voluntarily approached said crossing in charge of one in such condition, then, in that event, the negligence of said Cass Ferris or Wm. Ashley would be imputable to the said James Ferris, and you will find a verdict in favor of the defendant, even though you should believe that defendant's agents were negligent also.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

28 *Charge No.* 10 *Asked by Defendant and Refused by the Court.*

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas.

MRS. MOLLIE F. FERRIS ET AL. *vs.* THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant asks the court to instruct the jury as follows:

If the defendant's employés in charge of its engine saw the wagon in which deceased was riding stop before reaching the railway, and if it reasonably appeared to them, acting with such reasonable care as would govern a man of ordinary prudence under like circumstances, that such wagon would make no attempt to cross such railway until after such train passed the crossing, then you are instructed that it would not be negligence for such employés not to stop such engine.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Filed June 23, 1899.

Charge No. 11 *Asked by Defendant and Refused by the Court.*

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL. *vs.* THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant asks the court to charge the jury:

Although you should believe that the deceased, James Ferris, was at the time and place of the accident chargeable with no individual negligence, yet if you believe that at the time he, the said James Ferris, was engaged jointly with Cass Ferris and W. B. Ashley in driving said wagon, the same being then and there a joint and common enterprise, and the said James Ferris then and there
29 participating in the direction, government, and control of the team and wagon, and that said Cass Ferris and W. B. Ashley or either of them was so far intoxicated or under the influence of liquor to such extent as to render it unsafe for them to undertake to pass such crossing, and that such fact was known to deceased, James Ferris, at the time he embarked in said wagon, and that at the time

and place of the accident the said Cass Ferris and W. B. Ashley or either of them failed to act with ordinary care and prudence, which failure to act with ordinary care and prudence contributed to the injury of said James Ferris, then, in that event, the negligence, if any, of said Cass Ferris and W. B. Ashley or either of them would be imputable to the said James Ferris, and plaintiffs cannot recover, even though you should believe that defendant's servants and agents were negligent, and that such negligence contributed to the injury complained of, and in such event you will find a verdict in favor of the defendant.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 12 *Asked by Defendant and Refused by the Court.*

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant asks the court to charge the jury as follows:

If you believe that at the time and place of the accident the said James Ferris was so far under the influence of intoxicating liquors as to be unable to exercise ordinary care in passing such crossing, and that at such time he did fail to use ordinary care, and such failure to use ordinary care contributed proximately to his injury, you will in that event find for the defendant, even though you should believe that its servants were at the time and place negligent, and that such negligence contributed to the injury of said Jim Ferris.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 13 *Asked by Defendant and Refused by the Court.*

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant asks the court to charge the jury:

If you believe that Cass Ferris or W. B. Ashley or either of them in approaching said crossing failed to act with ordinary care and prudence, and that under all the circumstances they or either of them failed to act with that care and prudence which a man of ordinary care and prudence would use under the circumstances, and that such failure was the sole cause of the accident, you will find in favor of the defendant.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

30½ Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 14 *Asked by Defendant and Refused by the Court.*

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS *et al.*
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant asks the court to charge the jury as follows:

GENTLEMEN OF THE JURY: If you believe from the evidence that the said Cass Ferris and W. B. Ashley or either of them were drunk or so under the influence of intoxicating liquors as to render him or them an unsafe driver, and that the deceased, James Ferris, knew this or by the exercise of ordinary care could have known it, and that by reason of such intoxication such person failed to use reasonable care, whereby the injury occurred, then the negligence, if any, of such person would be imputed to James Ferris, and you will find for the defendant, even though you might believe that its servants had also been negligent.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 15 Asked by Defendant and Refused by the Court.

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

31 In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant requests the court to charge the jury: A railroad track is itself a warning of danger to those who go upon it, and persons about to cross a railroad track are bound to recognize the danger and to make use of their senses of sight and hearing to ascertain before attempting to cross it whether a train is in dangerous proximity; and if they neglect to do this, but venture blindly or carelessly upon the track without any effort to ascertain whether a train is approaching, it must be at their own risk.

THE M., K. & T. R'Y CO. OF TEXAS.
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS. *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 16 Asked by Defendant and Refused by the Court.

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant asks the court to charge the jury as follows:

If you believe that James Ferris, the deceased, was engaged, together with Cass Ferris and W. B. Ashley, in the common and joint enterprise of driving an open wagon, in which common and joint enterprise the deceased was co-operating with and assisting the said Cass Ferris and W. B. Ashley, and that the said Cass Ferris or W. B. Ashley was under the influence of liquor and failed to stop or look or listen for an approaching train as they approached said crossing, and that they, the said Cass Ferris and W. B. Ashley, failed to use ordinary care to ascertain the approach of a train that by the use of their sense of sight and hearing they could
32 have ascertained the same, and that under all the circumstances of the case they — either of them were negligent, and that such negligence contributed directly to the injury of James Ferris, then you are instructed that the negligence of such party is

in law the negligence of James Ferris, and there can be no recovery herein, even though you should believe that the servants and agents of the defendant were negligent and that such negligence contributed directly to the injury, and if you should so believe you will find for the defendant.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 17 *Asked by Defendant and Refused by the Court.*

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant asks the court to charge the jury as follows:
It is not the duty of those in charge of a railway engine to keep a lookout for parties approaching a crossing. It is their duty in approaching a railway crossing to blow the whistle and ring the bell as charged and to use reasonable care, and if any person, notwithstanding such signals and care, is discovered on the track at such crossing to use reasonable care to avoid injuring him after such discovery; but it is not the duty of the persons in charge of the engine to keep a lookout for those approaching the crossing, and a failure to do so does not constitute negligence upon their part.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

33 Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 18 *Asked by Defendant and Refused by the Court.*

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant asks the court to charge the jury as follows:
The failure to ring the bell or blow the whistle, or the failure of

the railway company to use the proper care and diligence in approaching the crossing, would not excuse the deceased, James Ferris, from the exercise of proper care. The duties of each in this respect are reciprocal, and although the railway company may have failed to perform its duty in the premises, still, if the deceased by the exercise of reasonable care could have avoided the accident, he would be guilty of contributory negligence, and should you so believe you find for the defendant.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 19 *Asked by Defendant and Refused by the Court.*

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant asks the court to instruct the jury as follows:
34 It was the duty of the servants and agents of defendant in charge of running a train on its tracks in approaching a crossing upon the track to ring the bell or blow the whistle to indicate the approach of the train. The use of these signals is prescribed for the safety of those in the neighborhood of approaching trains, but the failure to perform the duty of ringing the bell or blowing the whistle would not relieve the person in danger from the duty of using his senses to ascertain the presence of the approaching train. The failure of the servants and agents of the defendant to ring the bell and blow the whistle would be immaterial.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 20 Asked by Defendant and Refused by the Court.

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant requests the court to charge the jury: If the evidence shows that the deceased, James Ferris, was off the railroad track and out of reach of the train when the place where he was came within the view of those in charge of the train, and went upon the track after the train approached so near him that the same could not be stopped by defendant's servants and agents by the use of ordinary care and prudence, using all the means usual for stopping such trains, in time to avoid the danger, and that all such means were used at the time, then plaintiffs cannot recover, and you will return a verdict in favor of the defendant.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

35 Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 21 Asked by Defendant and Refused by the Court.

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant asks the court to instruct the jury as follows:
An inevitable accident is one that cannot be anticipated and provided against by human foresight. For such an accident there is no legal liability. If you believe that the accident herein complained of was an inevitable accident, you will find a verdict in favor of the defendant.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 22 Asked by Defendant and Refused by the Court.

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant asks the court to charge the jury as follows:

If from the evidence you should believe that the appearance of the said James Ferris upon the track was so sudden and unexpected that it left no time to stop the train and avoid the injury, then plaintiffs cannot recover, and you will find a verdict in favor of the defendant.

36

THE M., K. & T. R'Y CO. OF TEXAS.
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINK, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 23 Asked by Defendant and Refused by the Court.

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant asks the court to charge the jury as follows:

The running by defendant of trains upon its track was authorized by law, and the law did not impose any rule as to the rate of speed of such trains. The defendant was entitled to its track for its trains to run upon, and its servants and agents in charge of a running train had the right to act upon the presumption that the right of way for trains would be respected by persons approaching the track. This, however, would not excuse the negligent running upon and over a person on the track. It was the duty of the servants and agents of defendant in charge of a running train on its track at all times, and especially in passing through towns and in approaching crossings where people were accustomed to pass, to keep a lookout for persons on its track, and if a person was seen upon the track and in danger to check or halt the train if it could be done by the use of

ordinary care and by the use of ordinary means to avoid inflicting injury upon such person.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

37 *Charge No.* 24 *Asked by Defendant and Refused by the Court.*

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL. *vs.* THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant asks the court to instruct the jury: You are instructed that while it is the duty of the servants and agents of a railway company to keep a lookout for obstructions upon its tracks and crossings and to use ordinary care to prevent collisions therewith, yet it is not their duty to keep a lookout to ascertain whether persons are approaching said crossing or not, and that if they see such persons they have the right to assume that they will undertake to drive upon the track in front of an advancing train, and it is not the duty of those operating such train to slacken its speed or to stop the train for the purpose of permitting such persons to pass over the track. Hence, although you should believe in this case that the fireman, J. W. Slocumb, saw the deceased, Jim Ferris, and his companions approaching said crossing in a wagon, and that at said time they were at or upon the approach to said crossing, as testified to by him, then he had the right to assume that they would not undertake to go upon and over such crossing in advance of said approaching engine, and it was not the duty of said engineer and fireman to stop said train or slacken the speed thereof on that account; and if you should believe that after said engine had approached so near to said crossing that the agents of the company in charge of such engine were unable to stop the same, that deceased and his companions drove suddenly upon the track in advance of the engine and were struck, and that deceased under all the circumstances failed to use ordinary care, which failure to use ordinary care proximately contributed to his injury, you will return a verdict in favor of the defendant.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

38 Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 24a Asked by Defendant and Refused by the Court.

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant asks the court to instruct the jury as follows:

The defendant company in this case, in addition to the general denial, by which it denies that it has been guilty of any negligence in any of the particulars charged by plaintiffs, or that such negligence, if any, was the cause of the injury complained of, pleads that the deceased, James Ferris, was himself negligent, and that those in the wagon with him were negligent in such manner as is imputable to him, and that such negligence contributed directly and proximately to his injury. This is what is known in law as contributory negligence, under which you are instructed that even though you should believe that on the occasion herein inquired about the servants and agents of the defendant were negligent, and that such negligence contributed to the injury of James Ferris, you will, if you further believe that said James Ferris was also negligent, or that Cass Ferris or Wm. Ashley or either of them were negligent under such circumstances as that their negligence would be imputable to James Ferris under the charge hereinbefore given you, and that such negligence contributed to and co-operated with the negligence of the defendant's servants in producing the injury complained of herein, in that event plaintiffs cannot recover. In other words, if both parties are negligent and the negligence of each approximately contributes to the injury, there can be no recovery. Hence in this case, although you might believe that the agents of the defendant failed to ring the engine bell or blow the whistle,
39 as required by statute, or failed to keep a proper lookout, or that they were propelling said train at a greater rate of speed than would have been used by men of ordinary care, or that they were negligent in any of the particulars set out in this charge heretofore given you, and that under all the facts and circumstances of the case they were negligent, and that such negligence directly contributed to the injury of the said James Ferris, yet you are instructed that if you should further believe that the said James Ferris was familiar with the crossing and its approaches, and that he knew that this particular train was due at said crossing at or about the time it did reach there; that at the time of the collision he was so far under the influence of intoxicating liquor as to be incapable of prudent action, and at the time they approached said crossing Cass Ferris and Wm. Ashley were under the influence of liquor to such an extent as to render them unable to prudently drive, direct, and control a team on and over said crossing, and that deceased, Ferris, knew this at

the time he embarked in the wagon, and that said wagon was open, without cover or covers, and that each of the occupants thereof had a clear and unobstructed view of the defendant's track at said crossing and for a long distance to the north thereof as well as to the south before reaching said crossing and the approach thereto and at the same, and that there was nothing to obstruct his view of the approaching train, and that by the use of ordinary care he could have seen or heard said train approaching from the north, and that he did not look or listen to ascertain whether or not a train was approaching, or that if he did see such train he attempted to cross in advance thereof when it was at such distance from the crossing that a man of ordinary prudence would not have undertaken to make the crossing in front of it, and if you believe under all the facts in evidence taken together that the deceased, James Ferris, in attempting to pass over said crossing at the time and in the manner and under the circumstances developed in evidence failed to act with that ordinary and reasonable care and prudence which would characterize the actions of an ordinarily prudent and careful man under the same circumstances, and that such failure to act with ordinary care proximately contributed to his injury, then, in that event, you will find a verdict for the defendant.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 25 Asked by Defendant and Refused by the Court.

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL. *vs.* THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant requests the court to instruct the jury as follows:

The jury is instructed that a railroad track is of itself a warning of danger to those who go upon it, and those about to cross the same are bound to recognize the danger and make use of their senses of hearing and sight, and if either one cannot be made available the obligation to use the other is the stronger to ascertain, before attempting to make the crossing, whether or not a train is approaching, and if one neglects to do this, but carelessly or recklessly ventures upon the track and is injured, it is at his own peril; and if you believe from the evidence that in approaching said crossing the view of a train approaching from the north was unobstructed and deceased, James Ferris, saw or could have seen by looking such train as it approached, and if you believe that deceased, James Ferris, by the

use of ordinary care could have *been* seen such approaching train, and that he did not use such care, or that he could have heard such train approaching by the use of ordinary care and failed to use such care, or if you should believe that he saw such train and nevertheless undertook to cross in front of the same, and that under all the circumstances he failed to act with that care which would govern an ordinarily prudent man under the same circumstances and was negligent, and that such negligence contributed to his injury, you will find for the defendant.

41

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 26 *Asked by Defendant and Refused by the Court.*

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

You are instructed that the law provides no particular rate of speed at which a railroad train shall approach a public crossing, and it is for you to determine, under all the facts and circumstances of this case, whether or not said train in approaching this crossing did so at an improper rate of speed, and whether or not, under all the circumstances of the case, the servants and agents of defendant failed to use ordinary care in propelling said train at the rate of speed used; but you are further instructed that even though you should believe from the evidence that said train was being propelled at such rate of speed as was improper or imprudent, that nevertheless this would not justify the plaintiff in failing to use due care and diligence in approaching said crossing, and you are further instructed that a person in approaching a crossing has no right to presume that a train approaching the same is being propelled at any particular rate of speed, and if he sees a train approaching within such distance of a crossing that a man of ordinary care would not undertake to make such crossing, and nevertheless he does so, and that under all the circumstances he failed to act as a man of ordinary prudence would under the same circumstances, and such failure contributed to his injury, you will, in that event, find for the defendant.

42

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 27 Asked by Defendant and Refused by the Court.

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant asks the court to charge the jury as follows:

The law does not regulate the rate of speed at which trains shall be run passing through towns or cities, and if you believe that the servants and agents of the defendant in approaching the public crossing in this case gave proper warning of the approach of said train by ringing the bell and blowing the whistle, and that from the situation of said crossing a person of ordinary care and prudence in approaching said crossing in the manner used by the said James Ferris could have seen or heard the same in time to have avoided going upon said crossing, then you will find a verdict in favor of the defendant, even though you may believe that said train was running at a high and unusual rate of speed.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

43 *Charge No. 28 Asked by Defendant and Refused by the Court.*

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant asks the court to charge the jury as follows:

You are instructed that the duty of the servants and agents of the defendant company in charge of the train which collided with the wagon on the occasion under investigation did not require them to assume that persons approaching the crossing will undertake to cross in advance of the approaching engine, but they had the right to assume that such parties will stop before undertaking to make the crossing. Hence if you believe that the fireman, J. W. Slocumb, saw the wagon containing the deceased approaching the crossing, and that at such time they were stopped at or near the foot of the crossing, then he had the right to assume that they intended to permit the train to pass over the crossing before deceased undertook to

pass it; and if you believe that thereafter the deceased and his companions whipped the horses upon the track immediately in front of the engine and in such close proximity thereto that *that* defendant's servants and agents could not see the same, or if they did see it not in time to prevent the accident, then, in that event, you will find for the defendant.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 29 Asked by Defendant and Refused by the Court.

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

44 In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

The defendant asks the court to charge the jury:

Although you should believe from the evidence that the team of Cass Ferris became frightened to such an extent that it engaged the attention of said Cass Ferris and deceased, and if you should further believe that the same was caused by a switch-engine standing near the crossing and emitting steam, yet if you should further believe that deceased saw or by the use of ordinary care could have seen such switch-engine, and that they nevertheless undertook to pass in close proximity to such engine, and that thereby such animals became scared and so drew their attention that they failed to notice or listen for an approaching train, and by reason of such failure the injury occurred, then, in that event, the fact that the animals became frightened will not excuse them from exercising ordinary care to watch for and listen for an approaching train, and if they did so fail and such failure was the cause of the accident you will find for the defendant.

THE M., K. & T. R'Y CO. OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Charge No. 1 Asked by the Plaintiffs and Refused by the Court.

Filed June 23d, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

At the request of the plaintiffs you are instructed that if you believe from a preponderance of the evidence that the fireman on the engine drawing the passenger train saw the men and the
45 wagon as they were approaching the crossing, and if you further believe that it was apparent to the said fireman and would have been so to a man of ordinary prudence situated as he was that said men were about to enter upon said crossing and in consequence were in imminent peril of coming into collision with the said engine upon the crossing, and you believe that a man of ordinary prudence situated as the fireman was would have called the attention of the engineer to the peril of the said men, if you believe they were in peril, and if you believe that had the engineer's attention been called to such peril, if there was such peril, he could and would by the use of ordinary care, with the means at hand, have stopped the train before reaching the crossing and thereby avoided striking the wagon and killing said James Ferris, you will find for the plaintiffs, notwithstanding you may believe that the said James Ferris and the said Cass Ferris and Wm. Ashley failed to use ordinary care in approaching and entering upon the crossing and were thus guilty of negligence which contributed to the death of the said Ferris.

STAPLES & PARKER,
Attorneys for Pl'ffs.

Refused.
ED. R. SINKS, *Judge.*

Filed June 23, 1899.
R. J. GRIESENBECK, *Clerk.*

Judgment, June 24, 1899.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY OF TEXAS. } No. 1884.

And now, on this June 20, 1899, this cause being regularly reached and called for trial, came the plaintiffs in person and by attorneys and the defendant by attorneys, and both parties announced ready

for trial, and thereupon came a jury of twelve good and law-
46 ful men, namely, Cary Royston and eleven others, who were duly tried, empaneled, and sworn, and having heard the pleadings, evidence, and argument of counsel, and having received the charge of the court, retired to consider of their verdict, and after due consideration thereof, on, to wit, June 24, 1899, returned into court the following verdict, which was received by the court:

"We, the jury, find a verdict for the plaintiffs against the defendant and assess their damages at the sum of $10,000; and we apportion the sum among them as follows: Mollie F. Ferris, $1,250.00; Mattie Lee, $250.00; Sam. Richard Ferris, $900.00; Price Franklin Ferris, $1,000.00; Mina Kattie Ferris, $1,100; Millie Caldon-a Ferris, $1,250; Henry Cordell Ferris, $1,250; Dovie Emeline Ferris, $1,500; Lovie Eveline Ferris, $1,500.

CARY ROYSTON,
Foreman of the Jury."

It is therefore considered, ordered, adjudged, and decreed by the court that the plaintiffs each have and recover of and from the defendant, The Missouri, Kansas & Texas Railway Company of Texas, the damages apportioned unto him or her by the said verdict—that is to say, that the said Mollie F. Ferris, in her own right and for her own use, do have and recover of and from the defendant the sum of one thousand two hundred and fifty ($1,250.00) dollars; that the said Mattie Lee do have and recover of and from the defendant the sum of two hundred and fifty ($250.00) dollars; that the said Sam. Richard Ferris do have and recover of and from the defendant the sum of nine hundred ($900.00) dollars; that the said Price Franklin Ferris do have and recover of and from the defendant the sum of one thousand ($1,000.00) dollars; that the said Mina Kattie Ferris do have and recover of and from the defendant the sum of one thousand one hundred ($1,100.00) dollars; that the said Millie Caldonia Ferris do have and recover of and from the defendant the sum of one thousand two hundred and fifty ($1,250.00) dollars; that the said Henry Cordell Ferris do have and recover of and from the defendant the sum of one thousand two hundred and fifty ($1,250.00) dollars; that the said Dovie Emeline Ferris do have and recover of and from the defendant the sum of one thousand five hun-
47 dred ($1,500) dollars, and that the said Lovie Eveline Ferris do have and recover of and from the defendant the sum of one thousand five hundred ($1,500.00) dollars, together with all costs by them incurred or expended in this behalf, for which they may have their execution, and this judgment shall bear interest at the rate of six per cent. per annum.

It appearing to the court that the attorneys of record for the plaintiffs, Messrs. S. L. Staples and J. W. Parker, have a one-half interest in the recovery herein, as evidenced by written contract on file, which it is deemed just and is hereby approved, it is ordered by the court that the said interest be paid to the said attorneys or their order out of the proceeds of this judgment.

Bill of Exception No. 1.

Filed July 5, 1899. R. J. Griesenbeck, Clerk.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

Be it remembered that upon the trial of the above entitled and numbered cause, T. C. Wilson, a witness for the plaintiffs, having been duly sworn, was asked the following question by counsel for plaintiffs:

"State whether the road and street which crosses the defendant's railway at the point where the accident occurred is used by the general public, and, if so, for how long has it been so used."

To which question the defendant, by counsel, objected upon the ground that there were no allegations in plaintiffs' petition showing any special use of the road other than the general allegation that it was a public road.

This objection being overruled by the court, defendant excepted, and the witness, over defendant's objection, was permitted to testify.

"Yes, sir. It is so used and has been used by the general public ever since I have been in Smithville."

(The witness had previously testified that he had been in Smithville about three years.)

Counsel for plaintiffs thereupon asked the witness the question:

48 "Is such road used much or little?"

To which question the defendant, by counsel, objected upon the ground that there was no allegation in plaintiffs' pleadings to justify the same, the only allegation being that the crossing was a public road and street. This objection having been overruled by the court, defendant excepted, and the witness was permitted over defendant's objection to state:

"It is used considerably."

That plaintiffs' counsel thereupon asked the witness the question: "How was it on the 28th of January of this year?"

To which question defendant's counsel interposed the same objection as to the preceding interrogatories, and the same having been overruled by the court, the witness, over defendant's objections, was permitted to state:

"It was used about as much as at any other time as a public crossing."

And defendant, by its counsel, having then and there duly excepted to each and all of said questions and answers, now here presents his bill of exceptions thereto and asks that the same be signed, sealed, and made a part of the record.

The above and foregoing bill of exceptions is approved as correct and the same is ordered to be filed as a part of the record in this cause.

ED. R. SINKS,
Judge 21st Judicial District.

Filed July 5, 1899.
R. J. GRIESENBECK, *Clerk.*

Bill of Exception No. 2.

Filed July 5, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, A. D. 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

49 Be it remembered that upon the trial of the above entitled and numbered cause the following proceedings were had, to wit:

Plaintiffs introduced as a witness in their behalf SAM. FERRIS, one of the parties plaintiff herein, and he was duly sworn to testify in this behalf; whereupon the defendant objected to such testimony upon the ground that witness had refused to answer *ex parte* interrogatories propounded to him by defendant; and thereupon defendant offered in evidence the following interrogatories to the said Sam. Ferris and Frank Ferris, plaintiffs, which were accompanied by commission regularly issued under the provisions of chapter 3, title 40, of the Revised Civil Statutes relating to *ex parte* interrogatories, with the certificate of the officer to whom the same had been delivered for taking that the said party had refused to answer same, said officer being R. J. Griesenbeck, clerk of the district court of Bastrop county, Texas, as follows:

"25. Is it not true that the accident would not have occurred had not Cass Ferris, who was drunk, been driving?"

"26. Were not Cass Ferris, Wm. Ashley, and James Ferris all under the influence of liquor at the time of the accident?"

"28. Did you not state at the time and place of the accident that it would not have occurred had not Cass Ferris, who was driving the horses, been drunk?"

"29. State if it is not true that the parties in the wagon could seen the train approaching and have avoided the accident if they had looked for the same."

"31. State whether the accident was caused by the parties in the wagon failing to look and listen for the approaching train, or whether they saw the train and tried to beat it across and failed because it was going faster than they thought."

"38. Is it not true that your father, James Ferris, and his two companions, Wm. Ashley and Cass Ferris, at the time of the accident were under the influence of whiskey or of some other intoxicating liquor, and that they did not stop nor look nor listen for any approaching train, but negligently and carelessly drove onto the railroad track and were struck?"

50 "39. Is it not true that the accident was caused by the lack of ordinary care upon the part of James Ferris and his companions?"

"43. Is it not true that you never received any pecuniary benefit from your father, James Ferris, while he lived?"

"45. It is true, is it not, that if James Ferris and his companions in the wagon had have looked or listened for the approaching train as they approached the crossing that the accident would not have occurred?"

"46. It is true, is it not, that the accident was wholly caused by the carelessness of James Ferris, Wm. Ashley, and Cass Ferris in failing to look or listen for the train when they approached the crossing?"

Which said *ex parte* interrogatories to Sam. Ferris and Frank Ferris, parties plaintiff herein, are hereto attached, together with said commission and the return of said officer thereon certifying the refusal of said parties to answer, as a part of this bill and marked Exhibit "A."

And thereupon the defendant moved the court that the said interrogatories be taken as confessed against each of said plaintiffs, Sam. Ferris and Frank Ferris, and that the said Sam. Ferris should not be permitted to testify upon the propositions covered by such interrogatories.

That thereupon plaintiffs contended that under the act of the legislature of the State of Texas approved April 22, 1897, where either party to the suit is a corporation, neither party is permitted to take *ex parte* interrogatories; whereupon the court sustained said contention and overruled the motion of defendant that said interrogatories be taken as confessed as against said Sam. Ferris and Frank Ferris, and overruled the motion of defendant that said Sam. Ferris be not permitted to testify upon those propositions embodied in the interrogatories above set out; whereupon the defendant excepted upon the ground that said statute of 1897 is contrary to and in conflict with the fourteenth amendment to the Constitution of the United States, in this, that it deprives defendant corporation of the equal protection of the laws.

51 That thereupon plaintiffs asked permission to introduce testimony to ascertain whether the refusal of the parties, Sam. Ferris and Frank Ferris, was wilful; that thereupon it was proven by said Sam. Ferris that he was fourteen years old and his brother Frank was twelve years old; that thereupon the said R. J. GRIESENBECK, the officer taking such depositions, testified as follows:

Q. You are the clerk of this court?

A. Yes, sir.

Q. Did you undertake to execute a commission authorizing the taking of the depositions of Sam. Ferris and Frank Ferris, parties plaintiff in this suit?

A. Yes, sir.

Q. The commission was issued in this court?

A. Yes, sir.

Q. Tell the court in your own way how you proceeded about it.

A. I drove out to the place, about five miles—about four or five miles—and I drove up to the house, and one of the little boys—I

don't know exactly whether that is the one or his brother, but one of them—came out to the gate and spoke to me, and I asked him his name, and he said, I think, Sam. or Frank Ferris, I don't remember which. I could not say which one it was; it was one of them; it was the smallest one; and I asked him if his brother was there, and he said no, he had gone to the river; and about that time Mr. Klebe Trigg, the owner of the place where they reside, came up the road, and I spoke to him and shook hands with him, and I told him what I came for, and while hitching my horse he invited me in the house, and this little boy had gone off in the meantime, and as we walked up on the gallery to the house the little boy returned with his uncle, S. H. Gillespie, and I then talked to him, and this little boy again left, and while I was sitting there talking to Mr. Gillespie the boy returned with his brother. I told Mr. Gillespie what my business was there, and he said that he could not permit me to ask him any question, or that he could permit them to make any answer, and that he did that under instructions of his attorneys.

Q. What did you do then?

52 A. I just left.

Q. Did you read a single interrogatory to either one of these boys and call upon them to give an answer to it?

A. No, sir.

Q. Did either one of them ever refuse?

A. No, sir; I did not read the interrogatory.

Q. Did either one of them ever refuse?

A. No, sir; the uncle refused for them.

Q. You did not turn and call on them?

A. No, sir.

Q. So they never directly refused?

A. No, sir.

Q. And you did not read a line to them?

A. No, sir.

On cross-examination the witness R. J. Griesenbeck testified as follows:

Q. That statement that they refused to answer on the advice of their attorneys—that was made in their presence?

A. Yes, sir.

On redirect examination the witness R. J. Griesenbeck testified as follows:

Q. About how old was that boy?

A. Probably about ten or eleven years old.

Q. One was that old, and how old was the other one?

A. I judged the other one to be about twelve or thirteen. Mr. Gillespie told me that he had seen no attorney, but that it was told him by Cass Ferris. He stated to me also that he would bring the boys to town that afternoon to see their attorneys, and then if there was no objection Judge Garwood could ask him what he wanted to.

(Mr. GARWOOD:) I desire to reserve my exception both under the

State constitution and under the XIV amendment to the Federal Constitution.

And the court thereupon overruled the motion of defendant to take the interrogatories above set out as confessed, and thereupon overruled the motion of defendant that the said Sam. Ferris
53 should not be permitted to contradict or testify upon the matters embraced in said interrogatories; to all of which defendant excepted upon the grounds above stated. That defendant thereupon offered in evidence said *ex parte* interrogatories to Sam. and Frank Ferris, with the officer's return thereon showing their refusal to testify, and the same were then and there by the court excluded; to which action of the court the defendant excepted upon the grounds above stated, and now here tenders his bill of exceptions and prays that the same be signed, sealed, and made a part of the record.

Allowed and ordered filed.

ED. R. SINKS,
Judge 21st Judicial District.

EXHIBIT "A."

The State of Texas to the clerk of the district court, judge or clerk of the county court, or any notary public in and for the county of Bastrop, State of Texas, Greeting:

We hereby authorize and require you or either of you to summon Sam. Ferris and Frank Ferris, plaintiffs, residents of your county, to come before you forthwith, and that you then and there take their answers under oath to the attached copy of *ex parte* interrogatories, and that you return the same without delay to the clerk of this court, as herein provided.

1. That you reduce their answers so taken to writing in proper form and cause the same to be subscribed and sworn to by said witnesses.

2. That you certify under your hand and seal of office that said answers were sworn to and subscribed before you.

3. That you seal up in an envelope the answers so taken, together with the annexed interrogatories and this commission, with your name across the seal.

4. That you endorse on the envelope the name of the parties to this suit and the name of said witness.

5. That you direct the package to the "Clerk of the district court of Bastrop county, Bastrop, Texas."

6. That if said package is sent by mail the postmaster or
54 his deputy shall endorse thereon that he received it from your hands and sign his name thereto, or, if you entrust it to private conveyance, as provided by the statute, you will apprise the person receiving it that it must be delivered to the clerk of this court by himself in person, which evidence so taken as above is to be used on the trial of a suit now pending in the district court of Bastrop county, in the State of Texas, wherein Mrs. Mollie F. Ferris and

others are plaintiffs and The Missouri, Kansas and Texas Railway Company of Texas is defendant.

Herein fail not, but make return of this writ as the law directs.

[SEAL.] Given under my hand and seal of office, at Bastrop, this 13th day of May, A. D. 1899.

Attest: R. J. GRIESENBECK,
Clerk of the District Court of Bastrop County, Texas.

In the District Court of Bastrop County, Texas, to June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL. }
vs. } No. 1884.
THE M., K. & T. R'Y CO. OF TEXAS. }

To the hon. district clerk within and for Bastrop county, Texas:

Herein comes the defendant, The Missouri, Kansas and Texas Railway Company of Texas, defendant in the above entitled and numbered cause, and application makes for a commission to take the deposition- of Sam. Ferris and Frank Ferris, each of whom are parties plaintiff in the above styled and numbered cause, in answer to the attached interrogatories, the same, when so taken, to be used in evidence upon the trial of said cause, the said depositions to be taken *ex parte* and without notice, in accordance with the provisions of chapter 3, title 40, of the Revised Civil Statutes of Texas.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY OF TEXAS, *Defendant*,
By ORGAIN & GARWOOD, *Attorneys*.

Interrogatories to Sam. Ferris and Frank Ferris, Parties Plaintiff.

1. What is your name and age, and are you a plaintiff in this suit?

55 2. Are you a son of James Ferris, who was killed in Smithville on January 28th, 1899; and, if so, were you present at the time and place of the killing? And, if you say that you were, state all that you know about the accident.

3. At the time of the collision where were you?

4. Had you been in the wagon just before the collision; and, if so, why did you get out?

5. How did you get out of the wagon?

6. Where was the train when you first saw it—that is, how far from the crossing?

7. Did not the wagon stop a minute before going on the crossing and then were not the horses whipped onto the crossing?

8. Who was driving?

9. Where was Cass Ferris sitting at the time of the accident and what was he doing?

10. Where was Wm. Ashley sitting at the time of the accident and what was he doing?

11. Where was James Ferris sitting at the time of the accident and what was he doing?

12. How long had they been in town?
13. On what street did they approach the crossing?
14. From what place did they start to go home—that is, where did they have their wagon?
15. Whose horse were you riding?
16. (*a*) Where was Frank Ferris or (*b*) where was Sam. Ferris at the time of the accident?
17. How far were you from the crossing when you first saw the passenger train crossing?
18. How far were you from the crossing when you first heard the passenger train coming?
19. Where was the wagon when you first saw the train?
20. Where was the wagon when you first heard the train coming?
21. What were the parties in the wagon doing when you first saw and heard the passenger train coming in?
22. What was said by the parties in the wagon when you first saw the train coming?
56 23. Was not the train on the other side of the water tank when you first saw it?
24. State where the train was when you first saw it.
25. Is it not true that the accident would not have occurred had not Cass Ferris, who was drunk, been driving the horses?
26. Were not Cass Ferris, Wm. Ashley, and James Ferris all under the influence of whiskey at the time of the accident?
27. To whom did the bottle of whiskey belong which you found on the ground at the scene of the accident?
28. Did you not state at the time and place of the accident that it would not have occurred if Cass Ferris, who was driving, had not been drunk?
29. State if it is not true that the parties in the wagon could have seen the train approaching and avoided the accident if they had looked for same.
30. State whether the accident was caused by the parties in the wagon failing to look and listen for the approaching train, or whether they saw the train and tried to beat it across and failed, because it was going faster than they thought.
31. Why was it that the parties in the wagon did not see the approaching train at the time you saw it?
32. Who was it struck the horses which caused them to jump onto the track?
33. Did you see the man at the crossing warning them not to come onto the crossing?
34. Did you hear what he said to them?
35. How far can you see a train approaching said crossing from the north?
36. How long was it from the time you first saw the approaching train until it struck the wagon?
37. How rapidly was the wagon going when it went on the right of way—that is, was the team in a quick trot or how was it going?
38. Is it not true that your father, James Ferris, and his two companions, William Ashley and Cass Ferris, at the time of the accident

were under the influence of whiskey or some other intoxicat-
57 ing liquor; that they did not stop nor look nor listen for any approaching train, but negligently and carelessly drive onto the railroad track and were struck?

39. Is it not true that the accident was caused by the lack of ordinary care and diligence upon the part of said James Ferris and his companions?

40. Did James Ferris own his own home or did he rent?

41. If you say he owned his own home, state how many acres he had and what was its value.

42. If you say he rented, state from whom and how many acres and on what terms.

43. Is it not true that you never received any pecuniary benefit from your father, James Ferris, while he lived?

44. It is true, is it not, that James Ferris was an habitual drunkard?

45. It is true, is it not, that if James Ferris and his companions in the wagon had have looked or listened for the approaching train as they approached the crossing that the accident would not have occurred?

46. It is true, is it not, that the accident was wholly caused by the carelessness of James Ferris, William Ashley, and Cass Ferris in failing to look or listen for the train when they approached the crossing?

47. Did James Ferris, the deceased, leave surviving him a father or mother; and, if so, what is their names and where do they live?

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY OF TEXAS, *Defendant*,
By ORGAIN & GARWOOD, *Attorneys*.

THE STATE OF TEXAS, }
County of Bastrop. }

I, R. J. Griesenbeck, clerk of the district court in and for said county and State, do hereby certify that the above and foregoing is a true and correct copy of *ex parte* interrogatories to Sam. Ferris and Frank Ferris filed in my office on the 12th day of May, 1899, in cause No. 1884, wherein Mrs. Mollie F. Ferris and others are plaintiffs and The Missouri, Kansas and Texas Railway Company of Texas is defendant.

58 Given under my hand and seal of office this the 13th day of May, A. D. 1899.

[SEAL.] R. J. GRIESENBECK,
Clerk District Court, Bastrop County, Texas.

MRS. MOLLIE F. FERRIS ET AL. vs. THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884. Suit Pending in the District Court of Bastrop County, Texas.

Officer's certificate of failure of the witnesses Sam. Ferris and Frank Ferris to answer the accompanying *ex parte* interrogatories propounded to them by the attorneys for defendant in the above entitled and numbered cause and filed in said cause on the 12th day of May, 1899.

THE STATE OF TEXAS, *County of Bastrop.*

I, R. J. Griesenbeck, clerk of the district court in and for said county and State, do hereby certify that on this the 20th day of May, 1899, I went to the place of residence of the witnesses Sam. Ferris and Frank Ferris, aged about thirteen and eleven years respectively, the said place of residence being the farm residence of Mr. K. M. Trigg, situated about five miles south of Bastrop, in said county and State, and at present occupied as a dwelling by Mr. S. H. Gillespie and family, Mr. Gillespie being an uncle by marriage of the said witnesses, Sam. Ferris and Frank Ferris; that I found Frank Ferris at the house alone, and upon being asked by me what his name was he replied, "Frank Ferris." I told him that he was the little man I was looking for, and asked him if his brother Sam. was at home. He replied, "No; he is down at the river." I then informed him that I was an officer of the district court, and that I had some interrogatories propounded to him and his brother Sam. by the attorneys for the M., K. & T. R'y Co. of Texas that I wished them to answer. He replied, "Yes, sir," and immediately left the place, returning in a few minutes accompanied by his uncle, Mr. S. H. Gillespie, who asked what my business was out there. After being informed by me that I came out to take the depositions of Sam. and Frank Ferris, as two of the plaintiffs in a damage suit against the M., K. & T. R'y Co. of Texas, he informed me that
59 Sam. Ferris was not at the house just then, but for me to take a seat; that Sam. would soon arrive. Upon Sam.'s arrival Mr. Gillespie introduced him to me and told the boy (Sam.) what my business was out there. At this point Mr. Gillespie spoke to me, saying, "Mr. Griesenbeck, these children (referring to the witnesses above named) are left here in my care. I cannot permit you to ask them the questions, nor can I permit them to answer them. I will take the boys to town this afternoon to consult with their attorneys, and if they agree to it Judge Garwood can ask them all the questions he wants to after that time. I pursue this cour-e under instructions given by the attorneys for the plaintiffs in this suit."

For the reason above stated I herewith return the accompanying interrogatories unanswered by the said Sam. and Frank Ferris.

Given under my hand and the seal of said court, at office, in Bastrop, Texas, this the 20th day of May, A. D. 1899.

[SEAL.]

R. J. GRIESENBECK,
Clerk District Court, Bastrop County, Texas.

Filed July 5, 1899.
R. J. GRIESENBECK, *Clerk.*

Statement of Facts.

Filed July 25th, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

Be it remembered that upon the trial of the above entitled and numbered cause the following are the facts and all the facts proven thereat, to wit:

It is agreed in open court that the town of Smithville, which is situated in Bastrop county, Texas, is an incorporated town, incorporated under the general laws of the State of Texas, under title XVIII of the Revised Statutes of 1895; that it was so incorporated at the time and long prior to the date of the accident inquired
60 about in this suit, and that the crossing at which the deceased, James Ferris, was killed on January 28th, 1899, was a public street and public county-road crossing, and was at the time within the corporate limits of the said town of Smithville, and that the distance from this crossing to the northern limits of the town is about 3,063 feet.

Testimony of H. C. Walker.

H. C. WALKER, after being sworn, testified in behalf of plaintiffs as follows:

My name is H. C. Walker; my occupation, that of a locomotive engineer in the employ of The M., K. & T. R'y Co. of Texas, defendant in this suit. I have been so employed for nineteen years last October. I have been a locomotive engineer during that time. I am still in the employ of that company in the passenger service, my run being from Smithville to Hillsboro. I have been on that run for about five years and have been in the passenger service during that time. I was in active service in January of the present year and was handling the passenger engine during the month of January of this year between Hillsboro and Smithville, on the M., K. & T. R'y. Regular passenger trains at that time, I think, were composed of seven cars. I am not sure; it was six or seven—that is, on the run which I was on, which was the daylight run. These cars were the mail car, baggage car and coach, chair car, another coach, and sleeper; that would be six, and I think that constituted all the train at that time. I think that is all there were, but I

would not be positive. We set out a car at Smithville, but I think that was known as the Dallas car at that time. These trains were equipped with automatic air brakes, which are the brakes in general use. They had these on all of their passenger trains. I am familiar with the piece of track north of the crossing, which is just north of the passenger depot in the town of Smithville. The track, beginning at the crossing and going north, is straight for about, I presume, a quarter of a mile or over; I could not say exactly. It is over a quarter; it is about one-third of a mile. It is straight and upgrade, but I cannot say what the grade is at that point. It is quite a good grade. Coming this way, when the track turns it curves to the left from the crossing. From the crossing northward there is an
61 embankment for some distance. It crosses the creek and is graded for some distance north of the creek. In fact, it is graded up almost to the curve to where you start up on the cut. It is about one-third of a mile up to this curve from the road crossing. It may not be quite so far. The whistling post for the station on January 28th and prior to that time and since is at the place where it is now standing. To the best of my recollection, the post has not been changed from its present position for a long time. The post is on the curve north of the road crossing and is supposed to be half a mile north of the station. It would cut a little short of half a mile of the road crossing, as I would judge that it is 250 or 200 yards from the road crossing south to the depot. I am not able to say whether they have a yard limit at Smithville. They nearly always have a yard limit at these terminal points, but I cannot say that it was there. If it is there, I have become so used to seeing it that I have no recollection of it. I think it is somewhere near the curve, near the whistling post, if it is there at all. The whistling post for the crossing north of the depot is just possibly on the straight track as you go around the curve. Going south you turn the curve, and it may be possibly just when you get on the straight track of the road at the south end of the curve. Just guessing at it, I would judge this to be about one-third of a mile from the crossing. It may possibly be further than that from the road crossing, but judging from the distance I would judge it to be one-third of a mile from the road crossing to the whistling post. The signal given by a train arriving at the station whistling post is one whistle; that for a crossing is two long and two short whistles. A passenger train composed of six cars that I have named above, drawn by an engine to which was attached a tender, going southward upon a clear day, the rail being dry on the piece of track lying between the crossing in question and the curve and running at a rate of six miles per hour, the brake appliances being in good order and working properly, I should judge would not be able to stop in less than seventy-five feet, possibly 100. This, however, is really only an opinion. I have never seen any tests made, and it depends altogether upon my judgment, which is based upon my
62 experience as an engineer. There is another thing that should be taken into consideration, and that is that you are not expected to use the emergency stop only in the greatest emergencies.

Passengers might be standing up and it would plunge them forward. Assuming that an occasion had arisen requiring the use of the emergency, I would think that somewhere near seventy-five feet would be necessary to make the stop. Going into a station we apply the brakes some distance from the station, and if we leave the brakes set and then go down to a speed of six miles an hour, then if we wanted to make the stop suddenly it could be done in less distance. We might make a stop in 20 feet. That might be possible. It would depend on how tight you had the brakes set. Going at that speed they would have to be set just so tight to make that speed. They could keep reducing the speed. If you tighten the brakes, the speed will lessen. The further you go, of course, the brakes being set tightly, the speed will be reduced, but if the brakes were off, of course, a man would take a few seconds to move his hand. The engineers do not set with hand on the brake lever all the time. It also takes time for the air to travel. It takes time for the brakes to go against the wheels. Taking all these things into consideration, if running at six miles per hour, I think the train could be stopped in 75 feet. It is very difficult to tell in what distance a train could be stopped running at twelve miles an hour. You see we do not test these things and measure the distance, and it is just guesswork all around. Going twelve miles an hour you would travel three or four times the distance before stopping than you would going six. I would say that it would take about 300 feet, and 100 yards is not very far. The length of a train is 210 feet, and it would be pretty quick to stop in the length of a train. Half of the time would be consumed in the main making the move and getting the brakes applied before a shoe would ever touch a wheel. These cars are 60 feet long, the engine is 50 feet, and I think it would average 60 feet for the seven, which would be 420 feet. The train could be stopped within, possibly, very near 100
63 yards. It might vary a little either way. When you increase the speed, you increase the distance wonderfully. The emergency is a very dangerous thing to use, and is used only, of course, in cases of very great emergency. When you increase the speed it increases the distance in making the stop greatly. In my opinion, if you can stop in 100 yards, running at the rate of twelve miles an hour, which would be a sudden stop, then it would run fully three lengths of the train when going at the rate of 17 or 18 miles an hour; that would be three times 420 feet, which would be over 300 yards. Of course, I am figuring on that particular ground. It is considerably downgrade. I think it would take 300 yards to stop a train running at the rate of seventeen or eighteen miles an hour on that particular piece of track. If a train was going at the rate of 20 or 25 miles an hour, the distance increases, of course, greatly, but after your brakes once get hold you can apply them and you can run along a long enough distance, and the friction is very great, and then at the last the brakes take hold very rapidly and they take right hold of the wheels, and when you run a long distance the faster you are running the harder the brakes will get, and the last part of your stop will be made very suddenly, and it is a very difficult matter to make a correct estimate about the distance, because

in such cases we do not figure on the distance. My best judgment is, while I have had very little experience in making such stops, that a train running from 20 to 25 miles an hour could be stopped somewhere in about 350 yards; at the rate of from 25 to 30 miles an hour the distance would be increased slightly, possibly 50 yards—that is, within 400 yards. If an extra coach was added, and instead of six cars you had seven, the difference would be slight. The brake is on the engine and not on each coach. The distances that I have given would apply to a train of seven cars. If the number of cars were increased to ten or fifteen or something of that kind, it takes longer to get the air discharged. It is discharged from a pipe, and that causes the brakes to set. For that number of cars it takes a greater time on twelve than it would on six cars, because it is the same opening that you let the air dis-
64 charge from with twelve that you do with six; consequently it takes longer to get the brakes on twelve than it does on six. An engineer running south, after rounding the curve, has a view of the crossing and out to and beyond the limit of the right of way on the east side of the track. There may be some brush or timber along the creek, and I think there is some close to the railroad, but to say how close I cannot say, and it may possibly obstruct the view of the road off a little distance from the track. The brush might obstruct the view of the left side, while on the right it would be obstructed by the tank. The left is the east side. There is some brush there near the creek, but I cannot say that it would obstruct the view. I do not think this brush would obstruct much of the view of the crossing. Possibly it may obstruct none and possibly it may obstruct the view thirty feet or more from the track. There is some brush along the creek between the railroad bridge and the wagon bridge over the creek, as, after the engine rounds the curve. I do not believe there is anything to obstruct the view of the engineer of a wagon and team about half way up the dump on the east side of the crossing. Supposing the dump to be 50 feet long and half way up, it would bring the team within 25 feet of the track.

Cross-examination:

I have never seen any tests made with regard to stopping trains within given distances or at given speeds, and my estimates are in the nature of guesses and necessarily inaccurate and guesswork. It is very difficult for even an experienced railroad man to estimate the speed of a train by seeing it run along. It is more difficult for him to judge the speed of a train away from it than when he is on the train. Counting the click of the rails with watch in hand is very inaccurate. It is difficult always to form an accurate idea of the actual speed of a train. You have to time by something or measure the distance or else measure by what is known as the speed-recorder, which they have for trains the same as for bicycles, though I have used them but very little. In counting the click of the rails there are so many different lengths of rails that they are inaccurate, and it is also difficult for a

man to count accurately. You might take something
65 for a click of the rail and it would not be a click. An engineer in the proper discharge of his duty stays upon the right side of the engine, and in the proper discharge of his duty as engineer approaching the depot at Smithville from the north would be on the right side of the engine. The fireman stays upon the left side. There is a curve in the road between the crossing and the depot, and it might possibly be that that curve begins right at the crossing or very near it, but I never noticed it and I cannot say positively, but I am under the impression that it was straight from the road crossing north, but it might be that the curve there by the depot ran closer to the bridge than I thought, but I cannot say. I never noticed particularly about that, where it begins, but I am under the impression that it begins between the road crossing and the depot. An engineer sitting on the right-hand side of his engine cannot see to the left of the track for any point within the distance of 75 yards. At that distance he can only see the left-hand rail and not beyond that. Since being subpœnaed in this case I have taken special notice of this matter. The reason for this is that the dome, the sand box, the smokestack, the headlight, and the bell and side lights are all in the line of vision of the engineer looking to the left, and they obstruct the sight within 75 yards distance. The engineer upon the right-hand side cannot see a party approaching the track from the opposite side of the track within a distance of 75 yards. By leaning around the corner and looking up — of the cab his view would be better; but in order to do this he would have to take his attention away from his brakes and his apparatus for stopping his engine. He could not lean out of the window and handle his brakes, because it would throw him too far away to reach the brake appliances. This crossing I would judge to be somewhere near 200 yards north of the passenger depot at Smithville. It might possibly be less, but I would judge it to be about that distance. Assuming that this crossing was 510 feet north of the passenger depot and that the passenger train made the usual and proper stop at the depot, I would consider that the train was under control at the time it passed the crossing. I am familiar with the
66 locality near the passenger depot in Smithville, having been going in and out there for a good length of time. It is the end of my run. I know the location of the railroad crossing inquired about in this suit. A person on the approach to this crossing at the bottom of the approach could see a train approaching from the north as it comes around the curve, which is about one-third of a mile. Parties in a wagon at this crossing could see the train approaching the same from the north for the same distance. They could not see the flat scope of the track for one-third of a mile. There may be some brush or small timber in the creek, but whether it will obstruct the view or not I cannot say. The bridge over this creek is, I presume, about 50 yards north of the crossing, but I do not know exactly. I never noticed the distance particularly and have no accurate memory as to that. Front street, in the town of Smithville, runs practically parallel with the railroad and is the

street that is traveled by parties coming from the south northward towards this crossing. There is nothing whatever to obstruct the view of parties approaching this crossing along this street of trains approaching the crossing from the north. There is nothing whatever to obstruct the view, except the timber along the creek north of the crossing. This is up at the bridge over the creek, and I could not say whether or not that would obstruct the view. On the 28th of January last there was no foliage upon the trees, and it is not probable that the view would be obstructed of trains on the north side of the creek.

Redirect examination:

I have stated that within a distance of 75 yards ahead of the engine an engineer could not see a person approaching the track from the opposite side. Beyond that distance the engineer could see a person approaching. I noticed this just recently. About 75 yards in front of your engine you can only see the left rail. Then from there on up to the engine you cannot see the left rail at all, but you can see the right. Then outside of that rail you have to get further—it may be 60 yards—but just running along I judge it was about 75 yards beyond that that the approach of a person could have
67 been seen. The engineer keeps the lookout upon an engine, and the fireman is also supposed to do so. It is the duty of the fireman who sees an object or person upon the track to notify the engineer or the person in charge of the engine to avoid any accident. It is a natural instinct that a man will notify the engineer of danger, whether it is his duty or not, for self-protection. They are always particular to try to avoid anything of that kind, the engineer as well as the fireman. The fireman keeps the same lookout with the engineer. This is done for the purpose to safeguard the train as well as their own persons.

Recross-examination:

This bridge over the creek is about thirty feet distant from the tank. It is an ordinary bridge, without sides. If a fireman had seen parties near the approach to the crossing, but fully stopped, it would not be his duty nor that of the engineer to have stopped the train.

Testimony of George Hammond.

GEORGE HAMMOND, being sworn, testified in behalf of plaintiffs as follows:

I live at Smithville and am a locomotive engineer; have been such for 22 years. I am in the employment of defendant company; have been in its service going of 20 years. I am now in the passenger service; have been running a passenger engine eight years in the service of defendant company. My run is from Smithville to Hillsboro and Hillsboro to Smithville. I have been off the passenger run for about two years until the last two weeks. I had been in the passenger service, but not on that run. I am acquainted with defend-

ant's railroad, of its depot in Smithville, and have known that part of the road ever since it was a terminal point, which it has been a number of years. The track runs from the depot perfectly straight up to the top hill; then it turns to the left, going north. It is on a grade. I do not know the elevation of the grade. I am also acquainted with the road crossing just north of the passenger depot. That is the crossing on which the accident occurred. The general direction of the road is north from the depot. The general course of the wagon road is east and west. It crosses the railroad between the tank and the depot. I was not in the pas-
68 senger service on January 28th of this year. I have had a great deal of experience in stopping passenger trains and am familiar with the use of air brakes and the air appliances. These are the means employed in stopping passenger trains. I do not know what cars composed the regular passenger train running between Hillsboro and Smithville on January 28th, 1899. I was not in the passenger service at that time. The general run used to be six or seven cars, sometimes eight cars. Sometimes there was an extra car going each way. Our regular number is six cars. I suppose it must have been about the same in January. We often had extra coaches on the train, and since I have been in the passenger service this last time I have pulled a number of extra coaches. A passenger train composed of six cars—mail car, coach, another coach, chair car, sleeper, and another sleeper—running south over that portion of the road between the curve to the north of the depot and the crossing at a rate of six miles per hour, the day being fair and the rails dry, would require about 75 or 80 feet for stopping. This would be a quick stop. In an emergency it would take about 75 feet. A train running twelve miles an hour would require about 150 feet; 17 or 18 miles an hour would, I think, require or take 300 and some odd feet. I could not say positively. I would think about 400 feet. At 20 or 25 miles an hour would take from 800 to 1,000 feet. The ordinary passenger train, such as are usually run by defendant company over its track on January 28th, 1899, running at 25 miles an hour, would require about 1,000 feet to stop in; at 22 miles an hour, a little less than 1,000 feet; 30 miles an hour, about 1,150 feet. If there was added to this train an extra coach, making seven instead of six, it would require a little distance more to make the stop. It would make a slight difference. I cannot say exactly what. The difference would be from 150 to 200 feet. If the train were going at the rate of six miles an hour, it would be 100 feet—that is, 25 feet would be added for the additional coach; that is about as near as I can answer it. The distance would be increased about 25 feet in each case. An engineer rounding the curve can see southwards to the depot.
The road crossing in question is between the curve and
69 the depot. The closer you get to the crossing the more obscure it becomes. You can see the crossing as you turn the curve and for fifty feet to the left of the crossing. As you get closer to it you cannot see a team or any one standing to the left. You have to get about 75 or 80 yards from the crossing before this

is the case. It is near the approach where the view becomes obscure. From that distance to the crossing you cannot see any one at the foot of the crossing—that is, after you get within 75 yards of the crossing the view is cut off to the left and you cannot see any person on the crossing from its foot to the rail. I can see the rails up to within 75 yards from this crossing. There are no trees on the right of way or on the edge of the right of way that I know of. There are some brush along the edge of the right of way, but no large trees. There are some trees near the right of way. I do not think these would obstruct the view of a person approaching the crossing from the east. It is the duty of the engineer to keep a lookout, and also that of the fireman when he is not otherwise engaged. If a fireman sees a person on the track or near the track in peril and the engineer does not see him, it is, of course, his duty to notify him. Passenger trains have a regular schedule time. They can start from Smithville at a certain minute, and, if nothing happens, can so run as to arrive in Hillsboro on a certain minute. An engineer must therefore have some idea as to the rate of speed at which he is running; otherwise he could not run into stations on time.

Cross-examination:

My residence is in Smithville. There are no obstructions on the right of way that would obstruct the view of a person on the crossing or approaching the crossing of a train coming from the north. To the best of my knowledge, there is nothing on the right of way to cut off the view of a train approaching from the north from a person entering upon this crossing. I should judge that it is over 100 feet from the curve where a train first comes in view to the crossing. It is pretty nearly one-third of a mile, and for that distance there is nothing to obstruct the view of a person on the crossing of a train approaching from the north. A person approaching this crossing by Front street, coming towards the railroad crossing from up towards town, can command a plain view from that crossing north for a long distance and for a long time before you get to the crossing. A person coming up this street for a long time before they reach the crossing have a clear view of the track for a very considerable distance from the crossing northward. For 200 yards to the south of the crossing a man approaching the same from towards Main street can see a train all the way from the curve to the crossing. I judge that he could see the train as soon as she turned the curve, at every point, for 200 yards; could see the train from the crossing to the curve, which is about one-third of a mile, and I think that this plain view could be had for even further than 200 yards to the south of the crossing. The engineer sits on the right side of his engine, and as he gets close to this crossing his view of the same is cut off by obstructions on the locomotive, of persons and things approaching the crossing from the east or left-hand side. In coming to the crossing the team comes up an incline and the train is going down an incline, and when the engine is coming from the north the engineer cannot see the left of the track.

After he gets to the bridge, and unless a person or team is up on the track, he cannot see it unless the team or wagon is right on the crossing. It will be impossible for an engineer to see it. His view is cut off by parts of the engine—the stack, dome, the bell, the headlight, &c.—and the closer he approaches to the crossing the more obscure it becomes. I have never made any tests with regard to the probable distances within which trains can be stopped, and given only my opinion. The only test I ever made was one at six miles per hour. That time I threw on all the air at once. The only experience, therefore, that I have had is in making this one stop. I do not assume to be accurate, but answer from my general experience as an engineer.

Redirect examination:

From the bridge to the crossing is about 75 yards, and when you come to the bridge from that point onward to the crossing the engineer, staying upon the right side of the engine, cannot see a person approaching a track from the left. Whenever the engineer's view is shut off by the parts of the engine or curve in the track, it is then open to the fireman.

71 *Testimony of G. G. Machan.*

G. G. MACHAN testified in behalf of plaintiff- as follows:

I am a photographer and have been such photographer for several years. I took a number of photographs of the crossing where the accident under investigation is said to have occurred and the vicinity. They are correct representations and correctly represent the views of such locality. They are taken at different angles and different distances, directions, and positions, but give each a correct picture of the railroad crossing, water tank, passenger depot, bridge, etc. I cannot now remember the exact spot at which my camera was located when each photograph was taken, but can state that each is a correct photograph. The witness here identifies photographs Nos. 1, 2, 3, 4, 5, and 6 as correct pictures of the locality taken by himself, and they are introduced in evidence by the plaintiffs, and under order of the court said original photographs are ordered to be sent up with the transcript as a part of the records and statement of fact herein. The witness here identifies photographs Nos. 1A, 2A, and 3A as correct photographs of the locality taken by himself, and they are each introduced in evidence by the defendant, and under order of said court are sent up as a part of the record and statement of facts herein.

Testimony of T. J. Hardeman.

T. J. HARDEMAN testified in behalf of plaintiffs as follows:

I am a surveyor and civil engineer. I am familiar with the crossing north of the passenger depot in Smithville where the accident under investigation occurred, and have drawn a plot showing location of the same, position of the depot, the Y connecting the

main line with the Lockhart branch, the crossing, the water tank to the north thereof, the bridge, the whistling post, and the various distances and directions of the several objects in the vicinity. The plot shown the witness is here identified as that made by him. The general course of the M., K. & T. R'y is north and south, and is indicated upon the map by a red line; the corporation line is 3,063 feet north of the crossing; beginning there and coming southward for a short distance there is a slight curve to the left; the road then be-

gins to curve to the right, and continues to so curve until you
72 reach the point of tangent, which is about 1,600 feet from said

corporation line; it continues thence in a straight line down to a point near the water tank, where there is a slight curve to the left, the beginning point of which is indicated by the dotted red line marked P. C. L., which curvature to the left continues to the passenger depot. The red line, curving out to the right from a point just north of the crossing, and marked "curve of the Y," connects the main line with the Lockhart branch. Beginning near the north end of the depot, a switch or spur, indicated by a red line, runs out across North First street (which in the evidence herein is referred to as Front street) to the Powell gin, and is called the "Powell switch." A traveled road approaches the crossing along North First street (herein called Front street) and comes into the east and west road, which crosses the track at the public road crossing where the accident occurred, right at the foot of the approach to the crossing, about 50 or 60 feet from the top of the crossing. The road coming up North First street crosses the Powell switch at a point 185 feet south of the crossing. The red figures along the line of the railway indicate the distances from the corporation line southward towards the depot. The letters "P. C. L." mean "point of curvature left," and "P. C. R." mean "point of curvature right." The whistling board just north of Gazley's creek is for a crossing further to the north and for the use of trains approaching from the south. The W. X. board just to the north of the red line marked P. T., near the red figures 1,600, is the whistling board for the crossing where the accident occurred. The house indicated to the right is Mr. Kite's house, which is situated at another road crossing indicated on the map. The points north of the red line marked P. C. R., being the two posts on each side of the road, are the whistle board for the station, and the other indicates the number of the section; still further to the north is found the corporation line and the yard-limits board. The crossing where the accident occurred is 570 feet from the depot platform. The water tank is 223 feet north of the crossing. The Gazley Creek bridge is 337 feet from the crossing; the north end of the bridge is 551 feet from the crossing.
73 The whistle board for trains going north is 698 feet from the crossing. The whistle board for trains coming south is 2,053 feet from the crossing. The northern corporation limit is 3,063 feet from the crossing. I am familiar with this crossing, having often been upon it. The approach thereto from the east at or about the time of the accident was about 40 feet long from the foot of the grade to the top. The width of the approach was about 18 feet.

The grade is about 5.2 feet rise in 40 feet. There was a box culvert to conduct the water under the roadway and there were ditches dug carrying the water on past the embankment which the track occupied. There were two posts on the north side of the approach and on the south side there were two posts, one a railroad-crossing sign, the other a telegraph or telephone pole. The width of this approach is 18 feet. I should judge that a wagon from the end of the tongue back to the rear would be about 16 feet. The sides of the approach have a slope of about 1½—that is, the slope of 1½ feet to each perpendicular foot. The slope is the hypothenuse to a straight line. If it was one foot in height, it would be 1½ feet off; if 2 feet, it would be 3 feet off; at 5 feet, it would be 7½ feet. The approach is a right steep approach, although it is nothing impracticable to travel. It is a good deal steeper than we grade the approaches to bridges. There are some wesatch bushes on the east side of the track to the north of this crossing. If a man was travelling in an empty two-horse wagon, approaching this crossing from the south, would find his view to the north of the crossing obstructed by these bushes after he reached the switch that leads out to Powell's gin. From that point he could see from the crossing northwards to the south end of the bridge, about 337 feet. From that point the view to the north would be obscure—that is *is*, it would not be a clear view. That would have been the case on the 28th of January. Wesatch bushes are evergreens and have leaves upon them in the winter.

Cross-examines:

It is 185 feet from the point where the switch leading down to Powell's gin crosses the road leading up to the crossing. I don't know how many of those wesatch bushes are there. There are more than three; probably six. The largest of them is not
74 bigger than your arm, but the limbs and foliage are considerable size. A few of them have foliage now; the most of them are now dead. I cannot say that it is not a fact that on the 28th of January there was foliage on these bushes. For a distance of 225 feet south of the crossing a party approaching the crossing from the south has a plain view from the crossing up to the railroad bridge towards the north. By close observation a man could see a train approaching from the crossing clean up to the curve. If a man would stop and move about and get in position to see, he might see clear up to the curve. All I can say is that there are a few wesatch bushes there, but I will not undertake to say how many. A great deal of the foliage of those bushes is off now. There seems to be more off now than there was in January. The bushes appear to be dead or dying. I think that a man standing in front of Roger Byrnes' saloon up past Main street can see a train as it rounds the curve. He is then on higher ground, much higher ground. This is some 500 or 600 yards from the crossing. I expect that you could also see it from the Young Men's Christian Association and from the adjacent street. I never noticed this. I was employed about the 25th of March to make this plot. I have not submitted my bill for

this work, but intend to do so. My attention was not specially directed to the situation there about the crossing until after that time.

The plot described by witness Hardeman is here introduced in evidence, and under the order of the court herein made the original plot is made a part of this record and of this statement of facts.

Testimony of Cass Ferris.

CASS FERRIS, being sworn, testified in behalf of plaintiffs as follows:

I live in Bastrop county, out on Barton's creek; have lived in this county since before Christmas. I was born in the county, but lived in Fayette county for five years. James Ferris, the deceased, was my brother. I think he was born in Bastrop county. He is dead. He died at the railroad crossing in Smithville on the 28th day of January, 1899. He was struck and killed by a south-
75 bound passenger train on the M., K. & T. R'y, defendant company's railway. It was on the afternoon on January 28th, towards the close of the afternoon. I came to Smithville that day, about one o'clock, from my home, which is about five miles from Smithville and to the south. It was on the west side of the railway. I came to town in a wagon—a Rock Island two-horse wagon with a bed and one seat, a spring seat, which was placed in front on the sides of the wagon. I was driving a bay horse and a black mule, each of them about 15 hands high. The horse was pretty gentle. The mule was kind of scared, though I came to town alone and drove this team from my home to Smithville. I met my brother, James Ferris, about half past one o'clock at Mr. Gresham's store on the sidewalk. Mr. Wm. Ashley was with him at that time. I do not think either one of his children was with him. Both of the children were with him afterwards that day. Their names are Sam. and Frank. We started home about five o'clock, I guess. Mr. Ashley and James Ferris were with me in the wagon. I asked them to ride with me. Mr. Ashley got in the wagon in front of Lewis Sanders' store. My brother, Jim Ferris, got in the wagon in front of Mr. Byrnes' saloon. He had been in the saloon. If he got a bottle of whiskey there, I did not see it. The boys, Sam. and Frank, were riding horseback behind the wagon. They were both on one horse, the oldest boy in front and the youngest behind. When we left Byrnes' saloon we went north along Front street. I drove right on down the street, and when I got down in about 200 yards of the crossing I looked for a train and I went on a piece further, and there was a switch-engine standing on the switch-track. I went on and kept looking for the train, and I got on the crossing, and at that curve I looked for the passenger. I mean by that curve a little curve in the wagon road there. I was traveling north along Front street. This curve is there where you start up that *up that* dump. The road on which I traveled north intersects the east and west road, which passes over the crossing about five feet from the dump and upon which you enter to make the crossing. There is where you turn in. This point is about five feet from the foot of the

dump. When you turn into the road that runs east and west
76 crossing the railroad track you are then, I would guess, about 12 feet from the end of the dump. When I got to that point I saw the switch-engine, which was standing on the switch-track, which joins the main track a little above the crossing. The crossing passes over both the main track and the switch. This switch-engine was on the other or west side of the crossing and towards the depot or to the south. It stood about 27 feet south of the crossing, and in passing over the crossing you would have to pass within 27 feet of the engine. I was then 12 feet from the end of the dump. As I started to get on the dump I looked both ways, both up and down the track, for a train, and by that time my mule got scared at the engine. I also listened for the train at this point, 12 feet from the foot of the dump. I both looked and listened for an approaching train as I started up on the dump of the crossing. I neither saw nor heard any train approaching. The mule got scared at the switch-engine, and she stopped and kept sidling off and got scared. I hit her up again, and I think got up on the track, and they got scared again, and I tapped them up and something struck me. When the mule first began to misbehave I was down at the far end of the dump, and when the mule first r-ared up I was only half way up. The first time it misbehaved I had just started up at the end of the dump; the second time she was about half way up, when she r-ared back; the third time she was up about the track. The mule kept siding off to the right and misbehaved right smart, and I had to pull hard to get her straight; she was trying to go north or up the track. I was trying to pull her towards the switch-engine and she was pulling away from it. She was frightened at the switch-engine, which was about 27 feet from us. Steam was escaping from the switch-engine. The steam made a noise. The team was struck by the train. This crossing was, I reckon, about 12 feet wide. It was not wide enough to turn a wagon and team on. It was pretty steep. The misbehavior of the mule delayed us in going over the crossing. My attention was required by the misbehavior all the time. The collision of the train with the team and wagon killed the team and tore the wagon up. I was injured in the head.
77 My brother, James Ferris, was killed. As we approached the crossing I was travelling north on Front street and up to the time I turned into the road that runs east and west over the track. I kept a general lookout for trains in both directions and I saw no trains. The last time I looked was when I started up on the dump.

Cross-examination:

I live about five miles from Smithville; have lived there since a little before Christmas. Prior to that time I lived on Jim Slack's place, up towards Cistern. As I go into Smithville I sometimes use the crossing below the town, and then sometimes I use the crossing where the accident occurred. I sometimes come to town once a week and sometimes every other week. I use this crossing—the one where the accident occurred—about as often as

the other. I come to Smithville at least once a week. The time I leave there depends upon the time I come in. I often remain in town till five or six o'clock in the afternoon. If I come in late, I stay late. On the day of the accident I came in about one o'clock. I do not know how my brother, Jim Ferris, and Mr. Ashley came into Smithville that day. The reason they came to go home with me in my wagon was that I asked them to go in; that is the only reason; I am certain of that. They were together the first time I saw them; they were at Mr. Gresham's store, on the sidewalk. It is not a fact that we remained together all the afternoon, from that time till we started home. We separated a right smart during the evening. When we started off in the wagon I was going home to my home. They were not going to my home. Jim lived on Mr. Fawcett's farm, and Mr. Ashley lived up the creek, but it was on their way. In going to my home you would not pass by their homes, but they were just going to ride down to the forks of the road; the road to Jim's house forked just after you crossed the railroad. It is not a fact that the reason these men were in the wagon with me was because Mr. Ashley was very drunk. Ashley was not drunk; he was drinking some. Mr. Jim Ferris was not drunk; he was not very near drunk. He drank one drink or two drinks; I did not see him drink more than one or two drinks. It is not a fact that the reason they were in the wagon is because they were drunk and I was hauling them out
78 of town. Mr. Ashley was drinking. It is not a fact that I had to lift him into the wagon. It is true that he was vomiting. I cannot say he was vomiting because he was drunk. He was vomiting on the public streets, but he might not have been vomiting from that. He had not taken anything to make him vomit that I know of. I do not know that he was vomiting from the use of whiskey and other intoxicating liquors. I saw Jim Ferris take two drinks on that day. These were in Mr. Byrne's saloon, about two o'clock in the afternoon. I also took two drinks there. I drank alcohol weakened with water. Ferris drank the same also. I saw him take one or two drinks of alcohol. That was all we had drank that day. I know Joe Leshiker. I do not know Vincent Longer. I did not drink anything in Joe Leshiker's saloon. I do not think I was in there. I will swear that I was not there. I did not go into Leshiker's saloon that day at all. I do not know whether Ashley was there or not. I did not see him get there. I never saw Ferris go there. I did not see either Ashley or Ferris have any bottles of whiskey or alcohol as they started to the crossing, and never at any time saw a bottle with either whiskey or alcohol in it in the possession of either of them. I do not know that Mr. Ashley had a bottle of alcohol mixed with blackberry brandy. I do not know that Ferris had a bottle of whiskey almost empty, but corked tight, showing that he had drank almost the entire bottle. I was not in the gambling house back of Byrne's saloon at any time during the day of the accident. I am sure of this. I was in Byrne's saloon. There is a gambling house back of this saloon, but I was not in it. I have never been in this gambling house. I do not know whether there

is one there. It is not true that I and Jim Ferris lifted old man Ashley into the wagon before starting around to Byrne's saloon. It is not true that we assisted him into the wagon. At the time he was vomiting he was back of Lewis Sanders' store. This was about half an hour before we started. After starting I went to McCaskill's shop to get a plow-point. Ashley and Jim Ferris went to Byrne's saloon. After getting my plow-point I went to the saloon also. I found Jim Ferris there. He came out and got into the wagon. Ashley was there also. We did
79 not drink any at this time. We drank at Byrne's the last time about half after two o'clock. This was the last drink of alcohol that we took. The first drink of alcohol that we took was about half after one. I drank just one swallow each time. I drank out of the bottle—a half a pint bottle. I do not know how much I drank. I am not in the habit of drinking alcohol. I was not drunk. The witness was here asked the following question: "Did you not state in the town of Smithville, on the day after the accident, in the presence of Mr. Sheffield, that you were so drunk that you did not know how you got to the crossing, and that you did not know how you got from there to the house of Mr. Tom Adkins?" to which the witness answered, "I do not know what I told him. I did not have my right mind at all. I do not know whether I told him this or not. I was not in my right mind. I do not deny that I said it, but if I did say it I was not in my right mind. I know Dr. J. H. E. Powell. I have known him about fifteen years. I do not know whether I saw him on the day after the accident or not. I did not state in the presence and hearing of Dr. Powell that I did not know at all how I got from town down to the crossing. I do not recollect telling him that. I do not deny that I have told him that. I might have told him that; I do not know whether I did or not. I do not recollect saying in either of these conversations that I thought when the collision occurred that the wagon had just turned over. I do not know whether I said this or not. I might have said it. I said that I listened for the approach of a train. I did not hear it whistle. I am not deaf, and I did not hear it whistle for the station. I did not hear it whistle for the crossing. I did not hear the rumbling of the train. I did not know that the train was coming. My sole reason for stopping was because my mule was scared. When I first looked for the approaching train I was at the foot of the dump. I looked for a train all the way down." Witness was asked the question, "Why did you say at the foot?" He answered, "I meant that I looked for it at the foot of the dump." My mule got scared and I never looked any more. I did not have time. My team was going up, so I did not have time to look. I did not know what time it was due, but I
80 did know that the passenger train went down about that time. There is some brush there that kept me from seeing the train. The question is here asked the witness, "Is it not a fact that all the brush there is there is two or three little bushes beyond the telegraph posts, and that even now the little bushes have not got a green leaf on them?" To which the witness answered, "They have not

got any leaves, but they are pretty thick. They were perfectly bare in the winter." I did not see any train, and I guess the reason I did not see it was because of those bushes. You cannot see up on the railroad track until you get about half way up the dump. I swear to this absolutely. It is not true that for more than 200 yards south of that crossing you have a clear and unobstructed view of the railroad track for more than 600 yards north of the crossing. I swear to this. When we started out from Mr. Byrne's saloon me and Mr. Ashley were on the seat and Jim Ferris was on the side of the wagon bed when we first started. I do not know how long he stayed there. I do not know whether he was standing up. When we approached the dump I hit the team with the lines as we went up on the dump to hurry them up. When I struck them the first time I had started up the dump and passed about five or six yards—about fifteen or sixteen feet—from the bottom of the dump. I guess the first time I struck them I was five or six feet from the bottom of the dump. When I struck them the second time I was half way, or a little over half way, up the dump. When I struck them the third time I was about to the track. I do not know how many times I struck them till they went onto the track. I struck them with the end of the lines. I was urging on the team. At this time Ashley was on the seat. I do not know what Jim Ferris was doing. I do not know how long I stopped at the bottom of the dump before I went on it. I cannot tell how long I stopped there. I did not look for a train at that time. I did not have time. My time was occupied in effort to control the team. They were hard to handle. I was attending to my horses. They scared after we started up the dump, about five or six feet from the bottom. The switch-engine was about 27 feet from the crossing. I am guessing at it. I do not know that it was 81 75 or 100 feet. I do not know that this is the engine that always stands there to take off the rear coach from the afternoon train. The little boys, Sam. and Frank, were riding behind the wagon somewhere pretty close. They were with us when we started from Byrnes' saloon. Both were riding on one horse. I do not know where they were when the collision took place. I did not hear one of the little boys call out to us as we started up the dump that the train was coming. If there was a switchman at the crossing who tried to warn us and prevent us from going upon the crossing and told us to go back, that the train was coming, I did not see him. I did not see any man there at the crossing at all; I swear to that. I did not see any man at the crossing. If he had been there, I could have seen him. I do not swear he was not there, but I do swear I did not see him. I did not see the man in front of me nor the train to the right of me.

Redirect examination:

At the time I looked for the train I did not know whether it had come around the curve or not. I expect I lost about a minute, by reason of the bad conduct of my team, in going over the crossing. If the animals had not acted badly, but had gone over the crossing,

I would have had plenty of time to have gotten over the crossing before the train struck us. Jim Ferris, my brother, was not drunk. He had with him a can of kerosene oil which he got from Mr. Gresham. If he had been drunk or under the influence of liquor, I would have known it. I thought that my wagon had turned over with me until they told me that the train had struck me. Dr. J. H. E. Powell is the doctor of the defendant company at Smithville. I did not send for him. If he came to see me, he came of his own accord or at the instance of the company, and at the time of the accident I was rendered unconscious by the blow which I received upon my head. It was about a week before I became conscious. My head would be good a week and then it would get wrong. I do not remember what I said during the first week. I do not remember talking to anybody or anything that was said.

Recross-examination:

82 On the afternoon prior to the accident it is not true that Ashley, Jim Ferris, and myself, while walking along the street of Smithville, ran against a lady, Mrs. Sheffield. No such incident ever occurred. It is true that I also have a suit against the defendant railway company for damages growing out of this same accident.

Testimony of Sam. Ferris.

SAM. FERRIS, being sworn, testified in behalf of plaintiffs as follows:

My name is Sam. Richard Ferris. I am the son of James Ferris, the deceased. I am living with my uncle, Mr. Sam. Gillespie, about three miles below Bastrop, and have been there during the past four months, since my father's death. My father was killed by a passenger train at Smithville on Saturday, the 28th day of January, 1899. At that time we lived on Mr. Fawcett's place, a few miles north of Smithville. I lived with my father. My mother died about five years ago. I have a stepmother now by the name of Mollie F. Ferris. I have one whole brother and two whole sisters, Mira Kattie Ferris and Mattie Lee. My brother's name is Price Franklin Ferris. I am fourteen years old, my brother ten, and my sister Mira eight and Mattie seventeen. I have half brothers and sisters as follows: Henry Cordell Ferris and Millie Caldona Ferris and two little ones whoes names I don't know. Henry Ferris and Caldona Ferris were alive when father was killed, and the two little ones have been born since. Henry is four years old and Caldona six. The two who have been born since father's death are girls and very young. They are twins, and named Dovie Emeline and Lovie Eveline. My father left in all seven childen, and they are all alive. My brother Frank lives with Uncle Sam. Gillespie, the same place as I do, as does also Mattie. Caldona lives at West Point with her grandfather, and Henry, Dovie, and Lovie also live there. I was with my father when he was killed. He left home that day about one o'clock to go to Smithville. He went afoot, my little brother

Frank being with him. He was also walking. I started to town about three o'clock on horseback. I got to Smithville, I think, about four o'clock. I went to Mr. Gresham's store.

I saw father just a little while after I got there at
83 Mr. Gresham's store. I also saw my uncle, Cass Ferris, that day at Mr. Gresham's store. I saw Mr. Ashley that day behind Mr. Fisher's store. My father and Mr. Ashley started to go home in Uncle Cass' wagon. The wagon started from Mr. Gresham's store. From there we went up to Mr. Byrnes' saloon and stopped in front of it. My father was in the saloon. He got a bottle of whiskey in there; it was a pint bottle. He got it to make eggnogg Sunday morning. He did not take any drink out of the bottle. I was sitting on my horse in front of the saloon. He took nothing to drink while he was in the saloon. He got in the wagon and stey started home. They went right down by the depot, going north. The railroad was to their left. My brother Frank was with me, riding behind on the same horse. We were going in a trot. I was before and he behind. We kept right close to the wagon, which also drove in front. My father was standing up in the wagon, holding to the spring seat, on which Mr. Ashley and Uncle Cass were sitting; he held on to the seat between Mr. Ashley and Uncle Cass, standing, with his hands on the seat. I remember when they got close to the dump of the crossing when they were struck. When they got up close to the dump, I was not far from them and could see them. I saw an engine near the crossing on the opposite side of the track from where I was. It was not very far below—that is, to the south of the crossing. It was only a short ways below the crossing. After Uncle Cass' team got on the dump they began backing off towards the right and did not want to go across the railroad, scaring at the switch-engine. They tried to turn to the right—that is, away from the switch-engine. They did this three or four times before the collision occurred. Uncle Cass hit them with the lines to make them go. During this time father was standing up behind, looking at the horses and holding to the spring seat. They finally got the horses upon the track, where they stopped. At that time they were rearing up and backing off. When I first saw the passenger train and the engine that collided with the wagon, I was right on this side of the railroad track that runs from the gin. This was about 20 feet from *from* the crossing. It was there that I first saw the engine. At that time the engine was just a little piece on the other side of the water tank. Uncle Cass'
84 team was then standing on the railroad crossing. There was steam escaping from the switch-engine down by the front wheels. It was making a noise and smoke was escaping from the smokestack. The passenger train was running pretty fast when it struck the wagon and team, which was knocked off to one side, and my father was killed. When my father got into the wagon at Byrnes' saloon he was sober. During the day he got some *h*erosene and a pair of stockings, and shortly after he got these things he left. He paid for them and was over at Mr. Gresham's store when he started for home. Uncle Cass went around by the shop to get a

plow point. Father was looking at the team when the train struck him. Uncle Cass did not loose any time in getting across by reason of the misbehavior of his team.

In answer to the next question, which is as follows, "Did the way the team acted cause any delay to your uncle in getting across the track?" the witness answers, "Yes, sir." The only property I have is one horse. My father was good to me, to my mother, and to the other children. He gave us nice clothes. My father was a farmer, but did not own any place of his own. He cultivated about thirty acres of land, on which he grew corn and cotton. He made about eight or ten bales a year. I do not know how much corn he made, but he made enough to do him. He had enough hogs to supply his own meat. He also raised garden truck, and we lived mostly on what we had at home. As we approached the crossing I did not hear any whistle blow and did not hear any bell ring on the train that struck my father. I did not hear any bell or whistle at all. I looked up the track to see if I could see any train approaching. I did this as we were going up the street. I was looking at the horses and to see if I could see any train. I did not see any train until it was just about the water tank. If there had been one coming down there, I could have seen it from where I was.

Cross-examination:

We lived about two miles from Smithville, on Mr. Fawcett's place. The house was right in sight of defendant's railroad track. This is to the north of Smithville. We were living there at the time the accident occurred and had lived there for about twenty years,
85 during which time we have been renting from Mr. Fawcett.

We saw the passenger train pass down every afternoon. Father saw the passenger train nearly every afternoon and could see it from right close to our house. We all knew just about what time that train would get to Smithville in the afternoon. On the afternoon of the accident I reached town about half past three or nearly four o'clock. I went straight to where father was when I got there, finding him by himself at Mr. Gresham's store, and stayed with him from that time on. From Mr. Gresham's store we went to Mr. Byrnes' saloon and stayed there until Uncle Cass came after me, which was but a short while. They only stayed at Mr. Byrnes' saloon a little while. When Uncle Cass came in the wagon father was on the gallery, and we all went right on off. When I first got to town my little brother was at Mr. Gresham's store with father. They were sitting down at the end of the store. No one was talking to them. I tied my horse behind Mr. Gresham's store, and after that my little brother and I went around to Mr. Byrnes' on the horse. My father walked, but we were all together. We all went through the streets, father in front and we behind him on the horse. As we drove on from Mr. Byrnes' towards the crossing we had to trot pretty fast to keep up with the wagon. When I first saw the train that struck the wagon I was right this side of the switch-track that runs down from Mr. Powell's gin. This switch-track is about twenty feet

from the dump. I was right behind the wagon, and the wagon had just passed the switch. I was right close to the wagon, within two or three feet of it. I was within twenty feet of it. When I stated I was within two or three feet of it I misunderstood you. By right close I meant within 20 feet. When we were at the switch we had been keeping up with the wagon pretty well and were close to it; not right close, but close. At that time the wagon was just a little up on the dump. They trotted right along till they got a little ways up on the dump, and I was coming along behind them. They trotted some little ways on the dump before they began to back. They had had got up on the dump when I called to Uncle Cass to stop. My sister Mattie, who is a party to this suit, is seventeen years old and
married, and her husband is still living. They were not living
86 with us at the time father died, and had not been for a good while. I did not holler at Uncle Cass to stop but one time. I hollered at him to stop; that the train was coming. He had just gotton on the dump, and the approaching train was on the other side of the water tank. The engine was just a little bit on the other side of the tank. The wagon did stop at the bottom of the dump. Uncle Cass might have whipped the horses once or twice. I never saw him hit them but twice. At the time of the collision Mr. Ashley was sitting on the right-hand side of the wagon. I am sure of that. Uncle Cass was driving and was on the left-hand side. Father was standing up behind the seat all the time. At the time the collision occurred I was 20 or 25 feet from the dump. I did not stop at the switch, which leads down to the Powell gin. I don't remember how far I had passed over the switch in the direction of the crossing at the time the collision occurred. It is not a fact that right there at the scene of the collision and immediately after the same occurred that I stated that Uncle Cass was to blame for the accident because he whipped the horses right up onto the crossing. I deny that I made such a statement. I do not know Mr. Bohannon nor Mr. Tom Murphy nor Mr. Clyde Reese. I deny that immediately after the collision and at the scene thereof that I stated to them that I called to my father to stop and they would not stop, but whipped the horses right up in front of the engine, and that whiskey was the cause of my father's death. I do not remember having made any such statement. After the collision we got down off of the horse and my little brother looked into my father's pocket. I do not know whether a bottle was gotten out of his pocket or not. I did not see anybody get it out. Father had put the bottle of whiskey that I mentioned which he got at Mr. Byrnes' saloon in his outside coat pocket.

Testimony of M. V. Thomas.

M. V. Thomas, being sworn, testified in behalf of plaintiffs as follows:

I live at Smithville, and am an engineer at the water and light plant. I have been day engineer since March 15th, a year ago. I
am acquainted with the first road crossing north of the M., K.
87 & T. depot in Smithville, where the accident under investigation occurred. The water and light plant is on the same

street with the crossing on the bank of the river, about five blocks northeast or the crossing—that is, about 300 or 400 yards distant. A person at the plant on the 28th of January, 1899, had a plain view of the crossing and the water tank and probably for 40 feet north of the water tank. I was on duty on that day and remember the accident. I was in the power-house yard, on a rick of wood eight feet high. I saw the approaching train when it was about 20 feet north of the water tank. I saw the engine. It was within twenty feet of the water tank and to the north. After that I saw the engine when it struck the men. When I first saw the wagon and team they were on top of the dump on the track. It was rather far for me to tell what the team was doing when I first saw them, but I think they were stopped on the track, for they were there a second or two apparently still.

Question is here asked, "When you saw the team on the track you say you saw the engine within about 20 feet of the water tank there, north of the water tank, and the team seemed to be stopped?" to which the witness answered, "Yes, sir." I cannot tell the exact speed at which the train was running. In my opinion, it was not less than eighteen miles an hour or probably faster. I heard the train whistle the station. There was one long blow and then two short blows above Mr. Kite's house. The engine when I heard these signals was at the whistle post of the station. That post is located right at the curve. I did not hear any other blasts of the whistle after that. I did not hear any whistle sounded for the crossing on which the men were killed. If any whistle had been sounded for that crossing, it would have been nearer to me than the engine was when it sounded for the Kite crossing as stated. Had there been any such signal, I think I would have heard it. I did not hear any bell ring.

Cross-examination:

I was standing at the water works, about 400 yards from the crossing. When I first saw the wagon and team it was on the dump
and on top of the track. My attention was first directed to
88 the train, which was at that time about 20 feet north of the
water tank. After that my attention was directed to the wagon. I could not tell how many persons were in the wagon nor could I tell in what position the men were in the wagon. I am not able to state whether one was standing up or whether all three were standing up. I could not tell whether any one was whipping the horses or not. There was nothing to obstruct my view of the wagon. I did not have over two second- to see it. I never saw the wagon at any time until it was on the crossing. It would be hard to tell where the train was at the time I saw the wagon on the crossing. It would be rather hard to see the wagon and the train at the same time. I can't tell where the train was at the time I saw the wagon, because I can't see two objects at the same time. I don't undertake to say where the train was at the time I saw the wagon. The first I saw of the train it was up about the water tank. After that I looked

and saw the wagon on the crossing, and the next moment the collision occurred. My attention being drawn exclusively to the wagon, I did not see the train. I never saw the wagon at any time before I saw it on the crossing. From the time that I saw the wagon on the crossing it was not more than a second or two until the collision occurred. The engine-house where I was is about 400 yards northeast of the crossing. I was partially in the street. There are six houses on the right side of the street coming up from the water and light plant to the crossing. The nearest of these houses is within seventy-five feet of the railroad. There are also about five blocks of houses on the left-hand side of the street. I don't know how to estimate the number. There were a good many. At the time I was on what would be the sidewalk of the street. We have the street partly fenced up and use it for piling coal on. The street is very nearly straight from that point to the crossing. From that point I have a plain view of the train from the water tank and north of it. There is a break in the timber on the creek that gives me at le-st 60 or 80 feet view from where I was standing of the train on the track. Having heard the whistle, I was looking for the train and expected to see it. At that distance of 400 yards from the crossing where the accident occurred I heard the two whistles, one for the station and one for the most northern road crossing there at Kite's. That crossing is north of the water tank and north of where the men were killed. When I heard these whistles sounded I stopped my work and looked to see the train. I did not have any time to wait. It came in just a short time after I heard the whistles; I would not undertake to say how long, but it was not any very great length of time.

Testimony of T. C. Wilson.

T. C. Wilson, being sworn, testified in behalf of the plaintiffs as follows:

I reside at Smithville and have lived there for a little over three years. I am familiar with the defendant company's railroad track north of its passenger depot in Smithville—that is, I am reasonably so. I know the crossing north of the depot—that is, the first public-road crossing. The road crosses the railroad track almost at right angles, running east and west. The general course of the railroad at that point is north and south. This public road is used by the general public and has been so used ever since I have been in Smithville. It is used considerably. On the 28th of January of this year it was used as a public crossing about as much as at any other time. At that date there were some small wesatch bushes close to the right of way on the east side of the track. Coming up Front street northwards and approaching this crossing you have a very good view of the railroad from the crossing up to about the far end of the bridge. Before you get to the switch that leads down to Powell's gin and the water works you have a better view than you do after you cross the switch. After crossing the switch the ground is lower and you make a little angle there in order to turn

up on the dump, and right along there the view of the road to the north of the bridge is obscured. There is a partial view through the undergrowth and brush, obscuring somewhat the view of the track north of the bridge; but you can see very clearly from the crossing probably to the far end of the bridge. You can see the approach of a train from the road crossing to the far end of the Gazley Creek bridge. Beyond the end of that bridge
90 the view would be obstructed, but not totally. It would be a little difficult for a person riding along in a wagon to see beyond that point. In order to see beyond that point he would have to pick out a view through the wesatch bushes that have grown up on the far end of the flat and obstruct the view above the bridge. This is the case for about 150 feet. After or as soon as a person strikes the right of way he has a good view. The width of the right of way is fifty feet on each side of the track. From the switch mentioned, running down to Dr. Powell's gin, to the right of way the view north of the Gazley Creek bridge is obstructed, as above stated, by the wesatch bushes.

Cross-examination:

The bridge over Gazley's creek is about 200 feet long and is about 250 or 300 feet north of the crossing where the accident occurred. From the Y. M. C. A., which is about one block north of Mr. Byrne's saloon and on the west side of Front street, you have a clear view of the bridge and 100 yards northwards beyond the bridge. You then have a clear view from the crossing to the bridge and to the north of the bridge all the way up to the switch leading down to Dr. Powell's gin. At that point you can see to the far end of the bridge. At a point half way between this switch and the crossing the far end of the bridge becomes somewhat obstructed, as the ground becomes lower, but as you approach the right of way the view becomes clear and unobstructed. The wesatch bushes which I have mentioned are about ten or twelve feet high and are not on the right of way. A good many of them are without foliage and are dead. I do not know whether they are dead in January or not.

Redirect examination:

At the point where the view is most obstructed you can see from the crossing up to the bridge. After you get to the right of way there is no obstruction of any kind, and you can see the track clear up to the curve, a distance of about 600 yards.

Testimony of B. M. Kite.

B. M. KITE, being sworn, testified for plaintiffs as follows:

I live at Smithville and have lived there about twelve years. My house is north of Smithville, to the east and near the railroad
91 track. I am acquainted with the public-road crossing north of the depot. There is a whistling post for that crossing, which is located 150 or 200 yards south of my house. There is a

public-road crossing near my place, which is a little to the north of my house; I suppose about 50 yards; hardly that far. I remember that day on which James Ferris and Wm. Ashley were killed and Cass Ferris injured at the public crossing north of the passenger depot at Smithville. I went to town that day. I crossed the railroad at the public-road crossing just north of my house. This carried me to the west side of the railroad. I went over into the Mount Pleasant addition and followed the dirt road from there to town. I was walking, and the road ran practically parallel with the railroad, and I suppose it is three or four blocks from the railroad to where I struck this public road. I saw the train that struck and killed these men. I heard the train whistle. At that time it was round above my house, somewhere in the cut. It was in the first curve to the north of the depot. I heard one whistle for the station—a long whistle. At this time I was between Gazley's creek and the road crossing, going in the direction of the crossing and the town. The train passed me on the way there. I heard one whistle, a long one. I did not hear any whistle sounded for the public crossing on which these men were killed. If any whistle had been sounded at the whistling post for this crossing the train would have been about 300 yards from me. My attention had been attracted to the train before it got to that whistling post, and if it had whistled at it I think I would have heard it. After hearing the long whistle for the station I did not hear any other. The train passed within 50 feet of me. The bell was not ringing when it passed. At that time the train was between the bridge and the crossing and nearer the crossing; I suppose about 50 yards—maybe not quite that far—from the crossing. I never heard any bell ringing on the engine at all. If it had rung, I think I would have heard it. I heard no whistles sounded for the crossing on which the men were struck, and I think I would have heard them had any been sounded. After the accident had happened and the excitement had died away
92 and I found out what had been done, I got to thinking about it and recollected the fact that they had not whistled or rung the bell as they approached the crossing. I could not undertake to tell at what rate of speed the train was running. It impressed me that it was running very fast. I said to myself, I don't know how you can stop at the station. It seemed to me it was running the fastest I ever saw a train running on this road. I live right there by the track and see trains pass every day. I have lived there about nine years.

Cross-examination:

I never saw the train strike the wagon. When the train passed me it was within 50 yards of the crossing. I never saw the wagon. I was not looking in that direction. When I saw the train 50 yards north of the crossing I was approaching the same crossing, intending to cross over it. I was a little northwest of it. I heard the train before that. I could hear it as it came across the bridge. I don't know exactly how far I was from it when I heard it whistle; it was

then out of my sight, just around the curve, some 400 or 500 yards away. I heard it plainly and distinctly. I am not mistaken about that. I don't know that I could hear the noise of the train approaching when the whistle sounded, but I could hear it soon afterwards. I could hear the noise of the train immediately after it got out of the cut. It was then about 300 yards, maybe 350 yards, distant, maybe 500 yards. When it first came in sight it was about 400 yards away, and I could hear the noise of the approaching train, independent of the whistle, 400 yards away, and did hear it at that distance. I would not undertake to state at what number of miles per hour the train was running. I cannot say whether the train made the usual stop at the station or not, but I suppose it did. I never paid any attention to it. I never looked towards the depot after the accident, but I suppose it made the usual stop there.

Testimony of B. W. Rhodes.

B. W. RHODES, being sworn, testified for plaintiffs as follows:

I live at Smithville, and am a minister of the gospel. I have been there a year and a half and was formerly pastor there. I re-
93 member the occurrence inquired about in this proceeding. I was not personally acquainted with either of the injured parties, except Mr. Ashley. I saw the passenger train which I was told struck them. At the time it came in I was somewhere near the passenger platform, either on the platform or right on the ground by the north end of it. After the accident I went up very near the scene. I observed the speed of the train as it came in. I am not positive whether the train passed me or not; possibly it did. It impressed me as though it was running in ahead of its usual speed. I was from six to twelve feet from it. It seemed to me that it had a tendency to drive me from it or draw me towards it. I sensibly felt the force of the atmosphere. It produced a remarkable effect upon me. I thought the train was running unusually fast. I have seen passenger trains come in over the same piece of road quite often, and this train impressed me as coming in unusually fast, faster than ever before.

Cross-examination:

I am a minister and am not familiar with the running and operation of trains. I suppose that it is true that every moving train creates an air suction. I was from six to twelve feet away from the train; not nearer than six feet. I was standing near the north end of the depot platform. I don't remember positively whether the last car or the next to the last car stopped opposite to where I was standing. My impression is that I was very near the rear end of the car when the train stopped.

Redirect examination:

I have no recollection of hearing any whistle signals given by the train. I am not able to say whether the bell was ringing or not.

Testimony of Dr. G. D. Wilkinson.

Dr. G. D. WILKINSON, being sworn, testified in behalf of plaintiffs as follows:

I am a practicing physician and live at McDuff, ten miles above Bastrop. I remember the occurrence inquired about in this suit. I was a passenger on the train which collided with the wagon. I took passage at Bastrop for Smithville. I was told at the depot and
94 also on the train that it was behind time. I remember the rate of speed between Smithville and Bastrop. It was about the ordinary rate. I heard no signals given by the engine on this train as it came into Smithville. I know I wondered if there was no law or ordinance requiring signals. I did not hear any bell ringing. It is emphatically my impression that no whistle sounded and no bell was rung as the train approached Smithville. My impression is that this train was going from 20 to 25 miles when it passed over the crossing.

Cross-examination:

The train stops at the depot. The witness is here asked the question, "Were you sitting with any one on the same seat and did you get off at the usual place for alighting at the Smithville depot?" to which he answered, "You will have to speak louder. My hearing is defective. I have taken cold."

Testimony of Mrs. R. J. Shepherd.

Mrs. R. J. SHEPHERD, being sworn, testified in behalf of plaintiffs as follows:

At the time the accident occurred I was in Smithville, standing on my son-in-law's portico, on the front gal-ery, and in front of the road crossing were the collision occurred. The house is a little northeast of this crossing. I was standing at the point indicated in the picture shown me by counsel. This is a picture of myself. I was standing at the point indicated when I saw the train coming. (The picture shown to the witness is photograph No. 7 heretofore introduced in evidence.) I was well acquainted with James Ferris, and also knew Cass Ferris and Wm. Ashley. When I saw them they were in the wagon and just coming around the curve of the wagon road. The wagon in coming from the south came around a slight curve into the road which passed over the crossing. This is just before entering on the dump. This is on the east side of the road. At that time there was an engine standing on the side track slightly back from where the road crossed the railroad. This was on the west side of the crossing. I could hardly tell how far it was from the crossing. The wagon in passing over this crossing would pass as close to this engine as from the place I am sitting to the opposite
95 wall; I suppose about 30 feet; it could not have been over 25 or 30 steps, if it was that; I know it was very close. Just as I saw the wagon approaching I turned and showed the approaching train to my little grand-baby, which I was holding in my arms. I

saw the front part of the engine. As the men went up the dump the mule was shying, and they had a slight difficulty in making it come around at the first effort, but they finally got the mule to go up the hill. While I was looking at the mule the man who was holding the lines was trying to make him go up the hill. The mule was scaring; it leant backwards and to the right, and that cut the wagon round to the left, and he got it straightened out and started again and got half way up the dump, and the mule made a lurch and ran back, and that put the wagon in the same position again. The mule was leaning over against the horse, and it looked like it run the wagon around crosswise and threw the wagon in the bend like; this was the second time. He got them straightened out again, and I dropped my eyes, having my little baby in my lap, and when I raised them again the whole thing was in confusion. The elements were clouded with mules, horses, men, and wagon. When the team began to shy it was near the dump. The first time they got up nearly half way, and then the second time they got up about half way, and then the third time he had just got them straightened around, and I don't know that he was any higher than he was the second time. I know there were three efforts made to cross over. The first one was made just as they came up on the dump; the second was made about half way up, and the third was made somewhere about the top. When I saw the engine coming around the curve, the team at that time was right at the foot of the hill; they had misbehaved once. When they misbehaved the second time is when I saw the engine coming around the curve. I never looked at the train any more after the engine emerged from the cut at Mr. Kite's. When I raised my eyes from the baby, which I had in my lap, there was a man high up in the air. He was not as high as the ceiling, but he was away up about there, because when I seen him he was hanging with his hands down straightened out.

I did not know at first what it was. I have never seen
96 any one torn up that way before, and did not realize what it was until it had struck the ground. I was confident it was something that had been struck, but I never thought about it being this wagon and team, and by the time it settled to the ground I made out that it was the same wagon that was trying to get over the dump. Both the man and the mule were thrown pretty high, but the man was the highest. The misbehavior of the mule caused the parties to lose mighty little—a very little—time in getting on the crossing, because the mule and horse came trotting up there. It delayed them some. I don't know whether they stopped still after they got on top of the crossing or not. I took it that the mules shyed at the engine, which was letting off steam. The engine was not blowing any whistle, but the steam was just passing off. I did not hear the train give any signals. I did not hear any whistle sounded for the crossing, and to the best of my recollection I did not hear a bell. I think I could have heard them if they had been sounded. I could hardly tell you how far I was from the train when it passed. I judge I was about 100 yards away. I have stood there often and seen trains pass numbers of times, and I think the train

was going faster than any I have ever seen. It was going fast, and no mistake. When I saw the engine come around the curve at Mr. Kite's the parties in the wagon were then about half way up the dump.

Cross-examination:

My attention was drawn to the approaching train by the noise. A train makes a noise, of course, and I heard it and glanced in that direction. I had heard what is called the station whistle above Mr. Kite's, in the cut, and I just glanced around and saw the train. The house where I was standing is to the east and about 100 yards distant from the crossing. I heard the whistle and the noise of the train and looked up. That is my best judgment as to how I came to see the train. The parties trotted up on the dump. The horses were coming tolerably peart. The road which they were travelling from town does not go right into the crossing, but connects with the east and west road, which passes over the crossing some 20 or 30 feet from the foot of the rise. When I first saw the wagon it was
97 not over five feet from the rise. I did not recognize the parties in the wagon. Two of the men were sitting on the spring seat and one behind. The man that sat on the right side had the lines in his hand. I am not certain of this. The man that was standing was in a stooped position, holding to the back of the seat. He was in this position during the entire time that I saw them. When the wagon first got to the dump and was just making the rise the mule seemed to scare, and the man that was driving struck him with the lines, but not over once or twice. I don't think he hit the horses several times. He lapped them with the lines two or three times. The mule was scared when he struck them first. He ran backwards and carried the wagon round. This was the first time they stopped. He struck them another time. The mule was cutting up. He had his lines in his hands, and he popped the lines on the mule's back. The second time that the mule scared, and he got them straight again and was making an effort to get up the hill, was when I saw the train coming. The switch-engine that was standing there is the engine that usually stands at that point to take off the last car from the afternoon train. It seems to stand in the same position every evening. It might stand 75 yards back. I would not undertake to say how far. On the afternoon of the accident it was standing at the point that it usually does. It was not emitting any more steam than it usually does.

Redirect examination:

The switch-engine could have stood 100 or 175 yards from this crossing on the Y, but it was up close to the crossing—at the same position where it stands every evening.

Testimony of S. H. Gillespie.

S. H. GILLESPIE, being sworn, testified for plaintiffs as follows:

James Ferris, the deceased, was my brother-in-law. He was married twice. His first wife is dead. By his first wife he left two little boys and a little girl and a daughter that is married. The oldest is named Mattie. She is eighteen. The next one is a boy, Sam. He is fourteen. The third one is a boy, Frank. He is eleven, and the baby is a girl. She is eight years old. Her name is Mirv, and some call her Mina, for short. These are the children by
98 his first wife. He married a second time, but I could not tell who. His wife is here in the court-room. The children by both marriages were dependent upon him for support and education. Neither they nor his present wife have any means of their own.

Cross-examination:

At the time of his death his oldest daughter, Mattie, was married. Her husband is living. I think probably that on the day of the injury or the day before Mattie went back to her husband.

Testimony of Bob Sawyer.

BOB SAWYER, being sworn, testified for plaintiffs as follows:

I am a farmer and have lived near Smithville since 1870. I have known Jim Ferris since 1871 or 1872. He was a hard-working and industrious man so far as I know. I was acquainted with the public crossing in Smithville upon which he was killed. It is a very steep crossing. I never measured its width. It was not wide enough for a wagon and team to turn on. After a wagon and team had gotten half way up the dump they could not have turned around and gone back. I have never made any special examination of the crossing to determine these matters, but in traveling across it very often I have waited for other teams to come across so that I could pass. It was in this condition at the time of the accident.

Cross-examination:

Wagons can pass on the crossing, I suppose, by being careful. A wagon approaching the crossing half way up could back off. The difficulty in backing off would be that the wagon would probably cut and run off in one of the ditches. The dump is steep there. I don't know the depth, but I think it is more than four feet. The decline of the dump is rather gradual. It does not go straight down.

Testimony of C. C. Fawcett.

C. C. FAWCETT, being sworn, testified for plaintiffs as follows:

I live about a mile and a half from Smithville. I have known Jim Ferris all my life. I am thirty years old, and he is older than I. He was born near where I live and has lived in and around there

all his life. He was from 37 to 38 years old; maybe a little older. He was married twice. His first wife is dead. He had three children by his first wife. They are still living. I believe there were four children instead of three. He married a second time; possibly five years since. He had two children by the second wife when he died, and she has given birth to two since his death, making four in all. Ferris was a farmer. He owned no place of his own, but rented on my father's place. He has been on my father's place since January last. He had been living on my place in the post oaks, but before that he lived on my father's place eight or nine years. He usually cultivated from 45 to 50 acres. He was an industrious and hard-working man. He raised on an average about ten bales of cotton a year, sometimes eleven. He would usually produce from 300 to 350 bushels of corn. These were his main crops; but he always raised his potatoes, cabbage, and garden stuff. He usually raised his own meat. The price in value of his cotton would, of course, vary. On an average, I expect it was worth $300. Corn is not worth very much, but until last year it was worth to a farmer about 50 cents a bushel. I cannot estimate the value of his garden truck. He usually put up 500 or 600 pounds of meat per year, for which you would have to pay about eight cents per pound. I expect he earned something like $700 or $800 during the year; as much as $700, I suppose, because he always worked during the summer months. He usually did anything he could. He was an industrious man, and did whatever he had an opportunity of doing. He saved his roughness. I think he was inclined to be too indulgent to his family. He spent all of his earnings on his family or for their benefit. His children by both marriages and his second wife were dependent upon him for their support and maintenance. They had no property that I know of.

Cross-examination:

Ferris raised ten or eleven bales of cotton and about 300 bushels of corn. Out of this should be deducted the rent. The cotton rent is one-fourth. He paid money rent for his corn. He did not raise 300 bushels of corn last year. I could not say how much he raised. His corn gave out. He paid $20 for his corn land. During this year he has been living on my father's place at the old home. He came there in the latter part of January. His house is within 150 yards of the railroad track. Around the road it is about 2½ miles to Smithville and by the railroad track about two miles. He has lived at this house before. While he lived out in the post oaks one year he lived for the four or five years preceding in this house where he at present lives, and which is within 150 yards of the railroad track. He cultivated, on an average, about 45 acres of land.

Testimony of Mrs. Mattie Lee.

Mrs. Mattie Lee, being sworn, testified for plaintiffs as follows: I am a daughter of James Ferris, deceased. He was twice mar-

ried. My mother, Mrs. Mary Ferris, is dead. There were four children by the first wife—myself, Mattie, age 18; Sam, aged 14; Frank, aged 11, and Mina, a girl, aged 8. His wife by his second marriage is present in court. There are four children by the second marriage; two before his death and two born subsequent to his death. I am married; have been married three years. My husband's name is Marshall Lee. He left me two months ago, and I could not tell where he is. We were over the river when he left, and after he left I went to my grandmother Potter's, where I have since remained. He left me during the lifetime of my father, about two years before his death, and I went back to my father's and stayed there a year. He received me back into the family and supported me like he had always done. I have no property. Had my father been alive I would have returned to his house on the occasion of the second leaving of me by my husband.

Cross-examination:

At the time of my father's death I was living with my husband at Allen Pate's, across the river, and lived with him for a week after that time. I have not lived with him at all since then. I was married to Mr. Lee three years ago. I have been living sometimes with my grandmother, and reside with her now. I sometimes lived with her before my father's death, but not a great deal. I lived with her two or three times during which I was separated from my husband. My husband and I separated twice. We lived together four months and then he went off and stayed a year. During this time I lived part of the time with my father and part of the time with my grand-
101 mother. I stayed with my grandmother about one month at a time. During the time that my husband was gone and I was at my father's house my father clothed and fed me. He did not contribute anything to my support while my husband was with me. When my husband would leave, I would go back to my father's. While there I assisted in the household duties and worked and was industrious and helped them about the house. My husband has been gone about two months, and I have not heard from him since he left.

Testimony of Mrs. Mollie Ferris.

Mrs. MOLLIE FERRIS, being sworn, testified for plaintiffs as follows:

I am the second wife of James Ferris, deceased. At the time of his death we have been married five years and eighteen days. I had four children by him; two, Millie Caldona and Henry Cordell, who were born before his death, and two twin girls, Lovie and Dovie, who were born after his death (each of whom is present in court and pointed out by the witness). They are the two infants over there. Their several ages are as follows: Millie Caldona, aged 4; Henry Cordell, aged 2; Lovie and Dovie, born since his death and about two months old. There were eight children in all. My husband was kind to me and to the children. What he would make he put

at home, spending it on me and the children. He was industrous and saving. He raised the most of his home supplies. I have no property and the children have none. We were all dependent upon my husband for support and maintenance. He was 39 years old when he died. Price Franklin Ferris, the boy there (pointing him out), is a child of the deceased, and Mina Kattie Ferris, the girl there (pointing her out), is a child of his by former marriage. (Both children were present in court and pointed out to the jury by the witness.)

Cross-examination:

My husband left home for Smithville that day about one o'clock in the afternoon. He walked down the railroad. We live very close to the railroad and in sight of it. We have lived there four years. We could see and hear every train that passed from our house. We all knew when the different trains went by. We could hear them and often saw them. We knew when the regular passenger train went up and when it went down. We and all the
102 household knew at what time the regular passenger train was expected every day. Mr. Ferris knew this as well as we.

(Here the plaintiffs close.)

Testimony of Wm. Sheffield.

WM. SHEFFIELD, being sworn, testified as follows: I reside at Smithville and am a carpenter. On the afternoon on which the accident occurred I saw Cass Ferris, Wm. Ashley, and Jim Ferris on the street in front of Mr. Miller's fruit stand. I was walking with my wife, and Ashley fell against her and came near knocking her off the sidewalk. He struck her and came near knocking her off the sidewalk. All three of them appeared to be under the influence of liquor. I should judge them to be so from their actions. I did not know Jim Ferris at the time, but Ashley was one and Cass Ferris was the other. After running against my wife all three continued on together and went straight on down the street toward the freight depot. On the day after the accident I saw Cass Ferris at Mr. Tom Adkins'. He seemed to be in his right mind; heard Mr. Ferris state at that time and place that he had no recollection of leaving town; that he was drunk and had no recollection of when he left nor where he went.

Cross-examination:

I called on Cass Ferris the day after he was hurt for the purpose of sympathizing with him. I made a statement of what I knew about this matter to Mr. Penn, the claim agent of the company, who called on me and asked me what I knew about the matter. I am here at the solicitation of the company, which has furnished me transportation from Smithville. The pass reads on "account witness." At the time that Mr. Ferris made this statement he was not unconscious. He was lying in the bed at Tom Adkins'. His face

was swollen and disfigured and his head bandaged. I do not know whether he was under opiates. I believe my son was present, as well as George Gentry, Mrs. Ferris, and Dr. Hickman. I expect no remuneration from the company except my legal witness fees. I am not a wealthy man and have no interest in this matter one way or the other. I told Mr. Maney, the agent of the company at Smithville, that I would not attend the trial unless I was furnished
103 with transportation.

Testimony of Dr. J. H. E. Powell.

Dr. J. H. E. Powell, being sworn, testified: I am a practicing physician and have lived in Bastrop county since 1881 and have lived in Smithville since 1890. I recollect the occurrence under investigation. I am the local physician of the defendant railway at Smithville. On the day after the accident I requested permission of Dr. Hickman, the physician in attendance upon Cass Ferris, to see Mr. Ferris in his presence. This permission was granted, and on that day I saw Mr. Ferris at the house of Tom Adkins. Ferris said that he remembered nothing about the accident. At the time he made this statement he was conscious.

Cross-examination:

I am the company's physician at Smithville. I did not go to see Cass Ferris for the purpose of treating him, but to get a statement from him giving a record of his age, occupation, and the nature of the injury and the circumstances surrounding, which statement I intended to forward to the company, to the chief surgeon. I was not engaged in collecting evidence for the company. I read the questions to Ferris and wrote down his answers. This was during the afternoon. I did not examine Mr. Ferris. I saw the bandage on his head. I don't remember that his eyes were swollen. I am here on a pass furnished me by the defendant company. I do not know whether he was under the influence of an opiate or not. If he was suffering pain, it would have been proper to have given him an opiate. Opiates impair mental faculties more or less, but I do not think his was thus impaired. I do not know that Dr. Hickman expected him to die that day, as I did not hear him say. I was present about ten or fifteen minutes.

Testimony of Geo. Slack.

Geo. Slack, being sworn, testified as follows:

I know Cass Ferris, Wm. Ashley, and Jim Ferris. I saw them in the town of Smithville about a quarter of an hour before the accident. They were at Lewis Sanders'. They had some whiskey with them. I could not say for certain whether Cass Ferris or whether
Ashley had it; it was one or the other. I drank with them
104 and saw them drink. I drank first, Ashley next, and Cass next. Cass was the last one to drink. Jim Ferris did not drink. My judgment would be that all three of the men had been

drinking. I did not see them after they left. It seemed to me that they were under the influence of liquor. Cass Ferris stopped me on the sidewalk and said, "Let's go back and take a drink." So far as Cass was concerned, I think he was able to attend to his business as good as anybody. I do not think Jim Ferris was equally sober. He was a whole lot drunker than Cass. I stood there and talked to him. I never saw him walk. He talked all right; he said he had as much as he could stand and refused to take another drink; he said he had all that he could carry and had enough. I could not say whether he was so drunk that he could not go home. He was able to stand up and talked all right. I could not tell whether he could have gone home all right from my place. Wm. Ashley seemed to be drinking more than either of the other two.

Cross-examination:

I am a friend of the Ferris and have been raised up with them. I was furnished transportation here by the defendant railway. I have no understanding with the defendant company as to what compensation I shall receive as a witness. I wrote to Judge Price, our county judge, and he told me that witnesses were entitled to $1.00 a day and mileage. I would not say Jim Ferris was so drunk he could not care for himself. He was urged to take a drink at the time I did, but he said he had as much as he could carry and enough and refused to drink.

Testimony of J. S. Haynie.

J. S. HAYNIE, being sworn, testified as follows: I have lived in Smithfield for ten years. I know Wm. Ashley, Cass Ferris, and Jim Ferris. I saw Wm. Ashley and Jim Ferris not more than 15 or 20 minutes prior to the accident. I waited on Jim Ferris in Mr. Gresham's store, where I was clerking, and he was under the influence of liquor considerably. To the best of my knowledge, Mr. Ashley was not able to take care of himself. The last time I saw Ashley he was reclining on the seat of the wagon and did not appear to be able to sit up. I sold Jim Ferris some oil. The oil tank was near the back door. He drove up to the door and came in. He stumbled up against the robe rack, and I said, Jim, you all seem to be drinking, and he said, "Yes; by God, we are all full." He staggered and fell against the rope rack. Jim seemed to be drinking, and said, "Yes; by God, we are all full." This was about 15 or 20 minutes before the accident. After this he got into the wagon. I did not see Cass at this time. Jim got in and drove the team out into the street from behind the store and I never saw them any more. Wm. Ashley was lying on the seat in the wagon with his — down on the seat, leaning forward with his head on his arm.

Cross-examination:

Ferris bought goods from me and took them out and put them in the wagon. An agent of the company has been to see me about

this case, and I have made a written statement to him as to what my testimony would be. He wrote it and I signed it. I came to Bastrop from Smithville for the purpose of testifying in this case on a pass furnished me by defendant company. I did not say a sober man could not have stumbled and fell against the rack as Jim Ferris did. He was sober enough for me to sell him goods and for me to take his money. He was sober enough to put the goods in the wagon.

Testimony of Brown Harwood.

BROWN HARWOOD, being sworn, testified as follows: I live in Smithville and my occupation is that of a groceryman. On the day of the accident under investigation I saw Jim Ferris and Wm. Ashley. They were in B. J. Gresham's store one time and at another were outside of the store. At about 5.15 or 5.30 o'clock Mr. Jim Ferris was in the store and bought a vessel of oil from Mr. Haynie, and as he started to go out of the back door he staggered and hit the derrick by the oil tank. Mr. Haynie said, "You are all drinking a good deal," and he said something that sounded like "Pretty damn drunk." About that time I looked out and saw Mr. Ashley sitting on the right side of the wagon creening over, something like this (indicating his position). His back was to me. I don't know whether his eyes were shut or not. Jim Ferris at the time mentioned staggered and I judged him to be under the influence of liquor.

106 Cross-examination:

I was waiting on a customer within eight or ten feet of the back door and saw him staggering. There was nothing for him to stumble against except the oil tank and the door. Until that time when he staggered, I had not thought that he was under the influence of liquor. It was the stumbling that brought it to my attention, and from that I concluded he was under the influence of liquor. He went out with a vessel of oil. Whether he paid for it or not, I do not know. I don't know whether he got into the wagon or not. I have never made any written statement about this matter, and have never been called on by any agent of the company. I came here from Smithville on a pass furnished me by the defendant company.

Testimony of C. J. Decherd.

C. J. DECHERD, being sworn, testified as follows: I have resided in Smithville about 12 years and am in the confectionery business. I know Wm. Ashley. I saw him about three-quarters of an hour before the accident. He was staggering as he walked down the street.

Cross-examination:

I state that he staggered a little. I came here on a free pass furnished me by defendant company. I declined to testify in this case until my witness fees were tendered me.

Testimony of Vinson Longer.

VINSON LONGER, being sworn, testified as follows: On the day of the accident I was keeping bar for Mr. Leshiker. On that day Mr. Ashley and Jim Ferris, the one that was killed, came into the saloon two or three hours prior to the accident and bought a bottle of whiskey. They were in the saloon two or three times, but I can't say whether they drank anything or not.

Cross-examination:

I came over here on a railroad pass.

Testimony of T. O. Hill.

T. O. HILL, being sworn, testified as follows: I am a druggist in the town of Smithville. I know Wm. Ashley, Cass Ferris, and Jim Ferris. I saw them 20 or 30 minutes before the accident. They were back of the drug store and Jim and Cass Ferris, were
167 trying to put Ashley in the wagon. They succeeded in doing so. Ashley was decidedly under the influence of intoxicants. I could not state the condition of the other two. They were in the alley back of the drug store, and when they got Ashley into the wagon they drove off towards Mr. Gresham's store. This was 20 or 30 minutes before the accident.

Testimony of W. H. Faubian.

W. H. FAUBIAN, being sworn, testified as follows: I know Wm. Ashley. I saw him about 25 minutes before he was killed. He was at the back door of Mr. Byrne's saloon. There is a gambling-room back there. At the time he had some companions with him. I do not know who they were. I never paid any attention to them. As I passed Ashley grabbed me around the waist and asked me to lend him some money, and at the same time he put his hand on his pocket and rattled some money.

Testimony of W. H. Clark.

W. H. CLARK, being sworn, testified as follows: I know Jim Ferris and Cass Ferris. I saw them in Smithville about half an hour before the accident. I saw them in a gambling-house in the back end of Mr. Byrne's saloon. I don't know whether they had been there any time before that day or not. I judge they were a little drinking. This was about 30 minutes before the accident.

Cross-examination:

I am a gambler myself—that is, I played a little. I know that the grand jury is in session here now. I don't know how the railroad company found out what I knew about this case. I came up here on a pass given me by the defendant company. Mr. Gentry, the constable at Smithville, told me where to get the pass.

Testimony of John Taylor.

JOHN TAYLOR, being sworn, testified as follows: I have lived in Smithville about 25 years and was born and raised in this county. I know Wm. Ashley, Cass Ferris, and Jim Ferris. I saw them late in the afternoon of the day of the accident on the streets in Smithville. It was in front of Lewis Sanders' store. I had started
108 home for supper. From what I saw of them it occurred to me that they were drinking a little. I could not tell which was drinking the most. I never noticed much about it. Me and some young fellow had started for supper. I stopped and sat down on the end of a barrel and they came up and shook hands with us.

Testimony of Lewis Sanders.

LEWIS SANDERS, being sworn, testified as follows: I live in Smithville, and run a store there for Mr. Moore. I saw Bill Ashley, Cass Ferris, and Jim Ferris something like an hour before the accident. They came through the store. Mr. Ashley was drunk, and Mr. Jim Ferris seemed to be under the influence of liquor. I don't think Cass Ferris was. This was about an hour before the accident.

Cross-examination:

I do not know how the defendant company ascertained what I knew about this case. A gentleman called on me and asked me what I knew about it. Having told him, he wrote out and I signed a statement. I came over to attend this trial on a pass furnished me by the company. I did not come until my witness fees were tendered me.

Testimony of Dan. Green.

DAN. GREEN, being sworn, testified as follows: On the 28th of January, 1899, I was the porter in Mr. Byrne's saloon. I remember seeing Mr. Cass Ferris, Wm. Ashley, and Jim Ferris in the saloon that day. They were there both before dinner and after dinner. They were there two or three times during the day. I sold them alcohol mixed with water and blackberry brandy. I think I sold them 25 cents worth to Mr. Ashley. At that time they did not drink anything. They had taken a drink of beer before that. They had taken drinks there about three times. The last drink of beer that they took was about an hour or half an hour before they left. I sold them a bottle of alcohol when they got ready to leave. Mr. Ashley was drinking, but I did not think he was drunk.

Cross-examination:

Jim Ferris drank there about ten o'clock in the morning. One of the Ferris did not drink at all. The other drank beer. They drank 5-cent glasses. Ashley drank beer, too. When they went to

go home Ashley bought a bottle of alcohol and blackberry.
109 Three of them got out of that saloon 40 cents worth of whiskey and beer. I don't think they were drunk.

Testimony of Ned Whipple.

NED WHIPPLE, being sworn, testified as follows: I know Bill Ashley and Jim Ferris; have known them ever since I was a boy. I saw them in Smithville on the day of the accident. I saw them at the bar-room, drinking whiskey. They were not drinking it at the bar; they were drinking it outside, out of the bottle. Old man Ashley drank the first drink and Mr. Jim Ferris the second. They drank on after that, and I left them there. They were drinking when I left. This was nearly train time.

Cross-examination:

I am a colored man and live in Fayette county; I lived there over nine years. I was visiting my sister and home folks at Smithville. I came to Smithville about dinner time. I did not drink anything myself at the saloon where I saw Ferris and Ashley drinking. They had a pint bottle of whiskey. There were three of them together, but I did not see Cass Ferris take any. I did not know him at the time, as I had not seen him in nine years. I could not say that they were drunk. This was late in the evening. I don't know how the railroad found out what I knew about this case. A man came to see me and wanted me to come to Bastrop. I came on the train to Bastrop. I paid my way; I did not pay my own money for it; I worked for it. The ticket was given to me. I signed a statement to this man before I got the ticket.

Testimony of G. H. Bohannon.

G. H. BOHANNON testified by deposition as follows: My age is thirty-three and residence Waco. At the time of the collision inquired about in this suit I was on the rear platform of the sleeper attached to the south-bound passenger train. The train stopped at the depot. I went back to the crossing immediately after the accident occurred. I stepped off the train just before it stopped at the depot and walked back, a few seconds after the collision. I saw three men, two horses or mules—cannot state definitely which—and all looked to be badly injured or dead, from what I could see at the time. The men were breathing, but looked to be nearly dead. One was lying at the south edge of the crossing, near the track,
110 just on the east side; the other two were lying just a little south of the crossing and on the east side. I saw a bottle lying near the man that was lying in the crossing; the bottle was a flat pint bottle of the ordinary size and kind of whiskey bottles; the bottle was corked tight; from the appearance, smell, and color of the liquid in the bottle I would suppose it to have been blackberry and alcohol mixed. There was a boy standing by the man who was lying in the crossing; this man was Jim Ferris, and the

boy said that it was his father. I would judge the boy to have been about ten or twelve years old. The boy stated that he and his brother were riding on horseback along behind the wagon which was struck by the train, and said that the team when it got to the crossing and the man who was driving the team *whoa* them up in front of the train as it approached the crossing. I heard the locomotive whistle upon the train which collided with the wagon give the usual signal for the crossing. The engine at the time the whistle was sounded was 1,500 or 1,800 feet north of the crossing. It was the regular road crossing whistle, being two long and two short blasts. I heard the engine whistle for the station; the whistle was one long blast, and was given 2,000 feet north of the station. The bottle had only about an ordinary whiskey glass of whiskey in it. I did not taste it, but smelled it; it was left lying by the side of the man.

Cross-examined:

I am defendant's roadmaster and was at the time of the accident. I have made a statement in writing of the facts connected with the collision, which was made to T. S. McDowell, superintendent, on January 30th, 1899. I wrote it myself. I have talked to no one about the accident except special agent, Mr. Penn. I have made no verbal statements to any one about it. I might have conversed with other employés and with other people about it, but I cannot state definitely. I made no other written statement. The train was ten or fifteen minutes behind time; it made between 35 or 40 miles per hour between stations. Upton is about 7 miles north of Smithville. The time of the train after leaving that point I should judge to be from 35 to 40 miles per hour. I do not remember hearing
111 any other whistles, besides the station and crossing whistle mentioned, made by this train. I heard John Pepple, the engineer, state about two hours after the accident, on the depot platform, that he did not see the men at all, but thought it was a horse he had hit, and did not see it until he had passed it.

The statement made by the witness G. H. Bohannon, above referred to, was here introduced in evidence and is as follows: "I was on the rear platform of the sleeper, and when that portion of the train passed over the crossing I saw a man lying near the south side of the crossing and two men lying a few feet further south and two horses or mules lying still further south. I stepped off of the train and went back to the crossing with Conductor William Johnson and Yardmaster Ben. Wilson. On arriving at the crossing I noticed a pint bottle, containing about two tablespoonfuls of liquid, and upon examining same I judged it to be alcohol and blackberry brandy. This bottle was tightly corked and lying in a foot or two of one of the men that was killed—a Mr. Ferris. There was a boy, whom I judge to be about twelve years of age, standing by Mr. Ferris. He stated that he was Mr. Ferris' son; that himself and brother was riding on horseback behind the wagon, and that the team stopped when they came to the crossing, and the man who was driving was drunk and

whipped the team onto the crossing in front of the train. From the appearance of the wagon the train struck the forward part of the front wheels."

(Signed) G. H. BOHANNON.

Testimony of H. D. Parsons.

Witness H. D. PARSON testified by deposition as follows: I am thirty-nine years of age and reside at Erie, Pennsylvania. I am an electrician. I witnessed the collision on January 28th, 1899, on the wagon crossing north of the passenger depot at Smithville, Texas, between a wagon and its occupants and defendant's south-bound passenger train. I was south of the highway crossing in question, about midway between the yardmaster's shanty and the passenger depot, on the opposite side of the track, walking north towards the depot, to wait the incoming train. I was from 250 to 300 feet south of the highway crossing in question, walking and looking
112 northwardly towards the highway. I was on the east side of the track. I heard the rumble of the train before I saw it, and also noticed a wagon and team with several people in it approaching the tracks on the highway just north of the passenger depot. The team and wagon were coming towards the town—that is, eastwardly—and were on the opposite side of the track from where I was walking. I heard the crossing signal given, which was two long and two short blows. This signal was given just as the engine rounded the curve above the water tank and came in sight. The team and wagon had by this time got up to within a few feet of the tracks and had been brought to a full stop. The driver and occupants were apparently waiting for the train to go by before attempting to go across, and they seemed to be looking and watching the train's approach. The team and wagon had stopped just as I heard the crossing signal given. It seemed to be the inclination of the occupants to wait for the train to cross over. The team stood there for a little while, possibly half a minute, and then just as the train was at the water tank the driver in the wagon whipped up his horses, and they sprang forward with a quick lunge, and just got on the track when the engine struck the team and wagon, and they were thrown into the air. Then I rushed forward towards the crossing, but was unable to get up close on account of the crowd which gathered immediately around the place of the accident, and I went back to the depot. I first saw the train as it rounded the curve above the water tank. I was walking towards the depot at the time. The distance from where I was to the approaching train when I first saw it was about 250 yards; perhaps more. I am not sure whether I heard the station whistle or not. I think I did, but I am not positive. I distinctly remember hearing the crossing signal given. I remember it because it is what is known as a duplex whistle, a very peculiar whistle, which would naturally attract the attention of persons in the neighborhood. Two long and two short blasts were given. The bell was ringing as the train approached the crossing and the depot. The train came to a stop

at the depot and the engine was disconnected. I saw the wagon stop just before it reached the crossing. It stopped within
113 a few feet of the crossing. This was the only stop I noticed. The train was up above the curve, at about the water tank, when the wagon and team stopped. There were apparently no obstructions, nothing to prevent parties in a wagon from seeing the approaching train. They evidently stopped to wait for the train to cross over the highway before they should attempt to pass over. The team was in a few feet of the rail when it stopped. They came to a full stop and stood there for a little while, when suddenly the driver whipped them up, struck them with the lines or a whip, and the team bounded forward, and just as they reached the track the engine struck them. The engine was about opposite the water tank when the driver urged his horses forward with the whip. He evidently had determined to get across before the train. The team bounded forward with a quick lunge, and just as the team with a quick lunge bounded forward and reached the track the collision occurred. I was going to the depot to see the engineer on the incoming train, with whom I had business. The train whistled just as she rounded the curve up above the water tank. This was upwards of two hundred yards from the crossing. This was the whistle for the crossing, two long and two short blasts. I think I heard the station whistle, but am not sure. I am not positive as to the station whistle, but I distinctly remember the crossing whistle, because of the peculiar noise made by the duplex whistle. I recollect seeing the persons in wagon, and they were apparently watching the incoming passenger train. They brought the team to a full stop and were apparently watching the train as it came in. When I heard the train whistle for the crossing she had just rounded the curve, whatever that distance may be.

Cross-examined:

The wagon and its occupants were thrown about ten feet in the air. I cannot say how far they were thrown away from the crossing. I presume it was the driver who whipped up the team, but I cannot say whether the other occupants of the wagon were urging the team or not. I recollect seeing the persons in the wagon, and they were apparently watching the incoming passenger train, and brought their team to a full stop when they got near to the
114 track, and were apparently watching the train as it came in.

Testimony of Ed. Bonner.

Ed. Bonner testified by deposition as follows: I live in Denison, Texas, and was train porter on the train which struck the wagon. The whistle was blown on the engine of such train both for the station and for the crossing. The train stopped at the depot in the usual way. When it passed the crossing it was running at about the same rate that it usually does at this point. I heard the whistle sounded for the crossing; it was the usual crossing signal, two long

and two short blasts. I also heard the whistle for the station, which is one long blast. I heard no other whistle except these.

Cross-examined:

I believe this train is scheduled to make from 35 to 38 miles per hour between stations. I don't know as to what speed the train made on this occasion. I made a statement about the accident soon after it happened. I do not know the parties to whom I made it. He wrote out the statement and I signed it. That was two or three days after the accident.

Testimony of James Wagener.

JAMES WAGENER testified by deposition as follows: I was passenger brakeman on January 28th, 1899, at the time of the accident inquired about. At the time mentioned said passenger train approached the station at the rate of 8 or 9 miles per hour and made its usual stop at the passenger depot. It was not running at any unusual rate of speed. I went up to the scene of the collision. There were two men killed and one injured. The team was also killed. There was a large crowd there when I got there. I saw a whiskey bottle lying right under the coat of one of the men, right by his pocket, just as it had apparently slipped out of his pocket when he fell. This was the man they called Jim Ferris. I did not know him personally. The train, according to the best of my judgment, was running something like 8 or 9 miles when we passed the crossing. To the best of my recollection, I heard the crossing whistle sounded; it was four short blasts of the whistle. I also heard the station whistle; it was long blast. I know that this was a
115 bottle of whiskey that I saw, because it was in a bottle like that generally used to put whiskey in. It was an ordinary flat whiskey flask and had the color of whiskey. The flask was corked when I saw it.

Cross-examined:

I do not remember whether the train was behind time or not. I think we were on time, but would not be positive. The train makes 30 or 35 miles per hour between stations. I do not remember to have heard any other whistle sounded besides the two above mentioned. A day or two after the accident I made out a written statement of this matter to Mr. Penn, an agent of the company.

Testimony of James Frazier.

JOHN FRAZIER testified by deposition as follows: I am section foreman on defendant's railway at Smithville. At the time of the accident inquired about in this suit my section gang were working on the main track near the whistling post for the crossing where the accident occurred. I had been to Smithville and was going back to my gang, who were north of the crossing, as stated. I was on the

west side of the track between the gang and the crossing. I was about 150 yards north of the bridge over Gazley's creek when the collision occurred. The crossing where the accident happened is 507 feet from the north end of the passenger depot. The water tank is 200 feet north of the crossing. The bridge over Gazley's creek is 131 feet north of the water tank. I saw the south-bound passenger come in and approach the crossing. I was about 8 or 10 feet from the track, on the west side, when it passed, and I was looking at the train when it passed. The train whistled for the crossing at the W X sign post protecting said crossing, and also whistled at the station board, coming around the first curve north of Smithville. I can't state whether the bell was ringing or not. I am no judge of the speed of trains, but think the speed was about as usual for the class of train coming into Smithville. There is nothing to obstruct the view of one approaching the crossing where the accident occurred from the east so that such person could not see a train approaching from the north. There is one tree in the creek bottom, off the right of way, but at the time of the accident,
116 January 28th, 1899, there were no leaves on this tree and nothing to obstruct the view for about ½ of a mile north of said crossing. Any one approaching the crossing from the east can see a train approaching from the north for about ½ of a mile. The tree to which I refer only partially obstructs the view now, and with a tree in full foliage a person coming from the east and approaching said crossing can see a train approaching from the north for at least three or four hundred yards and perhaps more. At the time of the accident a person approaching the crossing from the east could see a train approaching from the north about ½ of a mile. The party approaching said crossing in an uncovered wagon coming up Front street from Main street could see a train approaching this crossing northwards from the same for ½ of a mile.

Cross-examined:

I did not see the actual collision. I made a written statement of what I knew about this matter to Mr. Penn, the defendant's agent, two or three days after the accident. He wrote it out and I signed it. I have never been asked to change or amend it.

Testimony of Jim Duncan.

JIM DUNCAN testified by deposition as follows: I remember the occurrence under investigation. At the time I was working for Mr. Frazier, section gang on defendant's main track, at a point between the whistling post for said crossing and the Gazley Creek bridge. We were nearer the whistling post than the bridge. I saw the train which collided with the wagon come in and go on down to the crossing. I was on the track and stepped off to the right side of the track 4 or 5 feet, just enough for the train to pass. As soon as it passed I went back to work. I don't remember whether it whistled for the crossing or not. I do remember that it whistled for the station while coming around the curve cut before coming in sight

of me. The whistling post for the station is situated around the curve north of the depot. The bell was ringing as it approached the crossing and began to ring just after whistling for the station and about the time it came in sight of where we were working and continued to ring all the way down to the depot. It came in at about the usual rate of speed of trains that come into Smithville of
117 that class. There is nothing to obstruct the view of any one approaching this wagon crossing from the east, so as to prevent such person from seeing a train approaching from the north. I know there is nothing to obstruct the view, especially at that time of the year. A person approaching the crossing from the east can see a train approaching said crossing from the north for ⅓ of a mile, and one approaching the crossing in an uncovered wagon coming up Front street from Main street has a clear view of an approaching train from said crossing northward for ⅓ of a mile, especially at that time of the year. There is one tree off of the right of way that might obstruct the view a little now, but at the time of the accident that obstruction would not have amounted to anything whatever. I heard the bell ringing, and, the accident having happened, that fact became fixed in my mind. I was working on the main track when the train passed and the bell was ringing. We were between the whistling post for the crossing and the bridge when the train came around the curve of the straight track, and the bell was ringing then. This was about ⅓ of a mile above the crossing. The sound of the bell was in my hearing from around the curve down to the depot. I cannot say how long this was. I don't know who was ringing the bell, as I was on the engineer's side.

Cross-examined:

I did not say that the engineer whistled for the crossing. The engine had not passed around the curve onto the straight track when I heard it whistle for the station. I did not hear it whistle for the crossing. I am a colored man and was working as a section hand at the time of the accident. Two or three days after the accident I made a statement to Mr. Penn, defendant's claim agent, of what I knew about it. He committed it to writing and I signed it.

Testimony of Major Jennings.

Major Jennings testified by depositions as follows: At the time of the accident I was working for Mr. Frazier's section gang on defendant's track north of the crossing, between Gazley Creek bridge and the whistling point for the crossing. We were raising low joints.
118 As the train passed going towards said crossing, I stepped about 5 feet to the side of the track when it passed. I looked directly at it as it was passing. It whistled for the crossing at a point just north of the W X or whistling board for the crossing. This is the usual and proper place for it to whistle for said crossing. Before whistling for the crossing it whistled for the station at a point around the curve, out of sight from where we were working. The whistling post for the station is around this curve

and is the usual and proper place to whistle for the station. The bell was ringing as it approached the crossing and began to ring around the curve and was ringing when the train came into sight onto the straight track and continued to ring until it stopped at the passenger depot in Smithville. The train was running at about the usual rate of speed of that train coming into Smithville. There is nothing to obstruct the view of any one approaching said crossing from the east, so that such person cannot see a train approaching from the north. A person approaching this crossing from the east could see the train approaching from the north from the time it got around the curve onto the straight track, a distance of about ¼ of a mile. A party approaching said crossing in an uncovered wagon, coming up Front street from Main street, could see an approaching train all the way from the curve down to the crossing, which I should judge to be about ¼ of a mile. There is no doubt about this at the time of the accident.

Cross-examined:

I am a colored man.

Testimony of Alf. Wilson.

Alf. Wilson testified by deposition for defendant as follows: I recollect the occurrence of the collision of the south-bound passenger train of defendant with the occupants of a wagon at the public-road crossing north of the passenger depot in Smithville on January 28th, 1899. I was working with Mr. Frazier's section gang at a point north of the crossing between Gazley Creek bridge and the crossing whistling post. I saw said passenger train come in and approaching the crossing. I stepped off of the track some 5 or 6 feet to get out of the way while it was passing. I looked directly at it while it was passing and saw it go down and approach the crossing. It whistled for the crossing just about as it was coming
119 off of the curve, north of the whistling post marked W X, which is the whistling post for said crossing. It whistled for the station at a point around the curve before it came in sight. The bell was ringing as it approached the crossing. It began to ring just after whistling for the crossing above the whistling post and continued to ring until after the train stopped at the passenger depot at Smithville. I am a poor judge of speed, but would think that the speed of the train was about as usual for that kind of a train coming into Smithville. At the time of this accident there was nothing to obstruct the view from the crossing where the accident occurred up to the curve, which is about ¼ of a mile. A person approaching this crossing from the east can see a train approaching from the north for about 600 yards or up to the crossing. At the time of the accident a party approaching said crossing in an uncovered wagon coming up Front street from Main street could see a train approaching from the north for about ¼ of a mile all the way from the curve down to the crossing. Now, there is one tree with some leaves on it off of the right of way which might obstruct the

view partially for a short while, but this obstruction would not amount to anything even now.

Cross-examined:

I am a colored man.

Testimony of E. R. Gentry.

E. R. GENTRY, being sworn, testified as follows: I am an employee of the defendant company and reside at Smithville. At the time of the accident I was standing on the incline that runs up coal to the coal chutes, about 600 or 700 yards from the depot. I was waiting for the passenger train to come in from the north, it being my duty to take the fire from its engine and send it to the engine-house. My attention was therefore directed to the train that collided with the wagon. I heard this train whistle for the station and also heard it whistle for the road crossing where the collision occurred. As it came around the Kite crossing—that is, around the curve—it whistled for the town. About half way between the curve and the bridge it whistled for the crossing. The crossing whistle was too long whistles and two short ones. The whistle for the station was one long whistle. I saw nothing of the accident.

Testimony of G. W. Jones.

G. W. JONES, being sworn, testified as follows: I live at Cleburne and run a lunch counter there. At the time of the accident I was a call-boy in the employ of the defendant company. When the train came in I was about half way between the passenger depot and the round-house. The train whistled as usual. It gave one long whistle for the station and two long and two short ones for the road crossing where the accident occurred. I was about 600 or 800 yards straight down the track from the crossing at the time of the collision. I heard no other whistle except these two that I mentioned.

Cross-examination:

At the time I was about half way between the round-house and the depot and about 150 yards south of the depot. I was facing the round-house, and my back was towards the crossing. I was going to order a couple of trains, one north and one south. There were a great many trains coming out of that station every day. It was not an unusual thing to hear train whistles. You notice a passenger train more than others. I heard two whistles—the first for the station, the second for the crossing. I heard no other whistles than these. I was in the employ of the company at the time of the accident, as stated. I made out a written statement of what I knew about the matter and handed it to Mr. McDowell. I was notified to come down here by Mr. McDowell, the superintendent, and was furnished transportation by the company for that purpose.

Testimony of Tommie Shipp.

TOMMIE SHIPP, being sworn, testified as follows: I am fourteen years old, and live in Smithville. I recollect the time the collision occurred at the wagon crossing north of the depot. I saw the three men in the wagon just before the accident. They were on Front street, about half way between the crossing and town, going towards the crossing. They were laughing and talking and holding the horses back. The horses were prancing. Two of the men were driving, and the third one was standing up behind and leaning over the seat. The two in front were driving, and all were laughing and talking. All three of the men looked like they were under the influence of liquor. I was about 50 yards from them.

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Cross-examination:

I do not lay around saloons. I have not been around drunk-men very much. When I saw these two men driving by they were about half way between the crossing and town. They were about 200 yards from the crossing. I paid no further attention to them and did not see the collision. I know Mr. Penn, the claim agent of the defendant company. He has been to see me and talked with me about this case. I signed a written statement of my testimony presented to me by Mr. Penn. I came over here on a pass.

Testimony of M. E. Maney.

M. E. MANEY, being sworn, testified as follows: I have lived in Smithville for twelve years; it is my permanent residence. I am freight and ticket agent of the defendant company at that point. I have been with the company sixteen years. I remember the collision at the wagon crossing north of the depot on January 28th last. At the time I was in the ticket office at the window looking up the track. I saw the passenger train approaching from the north. I heard the train whistle for the station and looked out for it, that being my habit. A little after that they whistled for the crossing. I do not recollect hearing the bell ring. Having turned around to attend to some business in the office, selling tickets, I did not see the collision. There is a switch or Y which extends from the main track near the crossing out westward. On this switch a switch-engine always awaits the regular passenger from the north, which is No. 3, the one which suffered the collision. It is the duty of this switch-engine to take off the Dallas coach from the rear end of this train. The switch-engine runs down, backs in on this Y, and when the passenger train comes in they take the last car off, and then come back and couple on the sleeper. This switch-engine usually stands from 90 to 100 feet of the crossing. This is a daily occurrence and has been done every afternoon for the past two or three years. The switch-engine has stood at that particular place, about

100 feet distant from the crossing, every afternoon for the past
122 three years. It usually pulls up there from 20 to 25 minutes before the passenger train pulls in. I drew the plat which is here shown me. The railroad crossing is north of the depot and about 500 feet distant. The water tank is west of the railroad about 200 feet north of the crossing. The bridge is 135 feet north of the water tank. The Y upon which the switch-engine stands connects with the main track near the wagon crossing and is on the west side of the road. The place where the switch-engine usually stands is indicated by a double X and is about 100 feet from the crossing. The switch that leads down to Dr. Powell's gin is south of the wagon crossing on the east side of the railroad. The wagon road which you travel in approaching the crossing from the south towards town crosses this switch about 150 feet south of the crossing. There is a whistling board for trains going northward 155 feet north of the bridge and is indicated on the plat. Nine hundred and seventy feet north of this whistling board is the whistling board for trains approaching the wagon crossing from the north. From this whistling board it is 420 feet to the city limits. (The plat described by the witness is here introduced in evidence and is found at the conclusion of the witness' testimony.) I have resided in Smithville for twelve years and am familiar with the crossings where the collision occurred, the approaches to it, and the tracks north and south. There is nothing whatever to amount to anything to obstruct the view of a train approaching the crossing from the north of a party in a wagon approaching the crossing from the south. There are a few little bushes off to the right of way, but they do not obstruct the view. The party approaching this crossing from the south has a clear, plain, and unobstructed view of a train approaching from the north for a distance of at least 2,000 feet. From most anywhere along Front street a party approaching the crossing along that street has a plain and clear view of the railroad track from the crossing northward to the curve, a distance of about 2,000 feet. This view can be had from any point along the traveled street or roadway. There are some small bushes right up near the bridge. They are very small and
are off the right of way, and in January last they had no green
123 leaves on them whatever. They have a little foliage on them now. I know where the switch that leads down to Dr. Powell's gin crosses the Front Street road, which leads up to the wagon crossing. It is about 150 feet south of the crossing. There is nothing whatever to obstruct the view of a party approaching the crossing in a wagon from the south between this switch and the crossing. Such party at every point between this switch and said crossing has a plain and unobstructed view from the crossing for 2,000 feet to the north, and there is nothing to prevent him from seeing the train approaching from the north for a distance of 2,000 feet. From the Powell switch on up to the crossing he can see a train approaching at every moment from the time it comes around the curve, about 2,000 feet distant, until it reaches and passes the crossing. This condition obtains all the way down from the crossing along South Front street nearly to Main street, and a party approaching the

crossing from the south has this plain view of defendant's railroad track northwards from the crossing to the curve almost all the way from Main street up to and at the crossing. I went up to the scene of the accident after it occurred. I found a bottle there, lying near the man who survived. It was a pint bottle with whiskey or alcohol in it. It was about one-third full and was stopped up with a stopper.

Cross-examination:

I did not take the bottle out of the man's pocket. It was lying close to him on the ground. There was a stopper in it. I never rode in a wagon up Front street and over this crossing. I have gone over the ground on foot, and I did so right after the accident, and have examined it at different times since. I do not know that the engineer on the engine approaching from the north could have the same view of those approaching the crossing from the east for the same distance as they would have of the engine. He sits on the right side of the engine, which would be the opposite side from those approaching the crossing from the east, and the engineer, in order to see them, would have to lean out of the cab. The fireman, being on the left side, I think could see the crossing. The bushes that I mentioned are located up about the bridge adjacent to the right of way. I think they were located along the
124 creek close to the bridge. There are probably some bushes between the crossing and the bridge. I have examined this crossing and the approaches thereto at different times. I examined it recently in company with Mr. Davidson. I looked over the grounds with a view to my testimony in this case, and I say that there is no obstruction of the view of a person travelling in a wagon towards this crossing from the Powell spur track to the crossing of a train approaching from the north. There is no obstruction whatever with the exception of these little bushes. This clear and unobstructed view can be had at every point from the crossing along Front street to Main street, which is 300 or 400 feet further south than the Powell switch, which would be 500 or 600 feet from the crossing. I heard the south-bound passenger train give the two signals mentioned that afternoon. I was seated at my desk in the office and heard one long blast of the whistle for the station. I then walked to the window and heard the other signal. These were the only whistles that I heard. I did not notice any bell ringing. Of course I have taken some interest in this case. I do not see why I should not. I thought it was an unjust claim, and as an employé I thought it my duty to take an interest in it, and I have done what I can in getting facts together that would enable the company to defeat it. I have been in the employ of the company about 15 or 16 years, and am here on a pass.

(Here follow diagrams marked pp. 125 & 126.)

FOLD OUT IS TOO LARGE TO BE FILMED

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127 *Testimony of B. H. Colbert.*

B. H. COLBERT, being sworn, testified as follows: On the 28th of January last, at the time of this accident, I resided in Smithville and was employed by the defendant company as a switchman. At the time that No. 3, the south-bound passenger which collided with the wagon, came in, I was on the depot platform, right in front of the ticket window. My attention was attracted by the train whistling for the station. I don't know for sure whether I heard it whistle for the crossing or not. When the train whistled for the station it was my duty to go up to the opposite end of the platform and cut the engine off; so when it whistled I walked away. I don't remember whether it whistled for the crossing or not. When the station whistle sounded it was my duty to go down to the south end of the platform and there cut off the engine, and I turned around and started that way. After I started I was talking to Mr. Johnson. He attracted my attention by saying, "Look yonder." I looked up the track and saw the engine. It looked to me to be about 50 feet from the wagon. At the same time I noticed Mr. Reese standing about where the main track and the Y part on the crossing. He was making some kind of signal. He had his hat off and was making some kind of sign, and I saw the team drive up on the track, and the engine struck the horse just above the shoulders. After it hit them the train came on down, and I cut the engine off. When the train was within 50 feet of the crossing, Mr. Reese was standing at the crossing, making some motions with his hands. He was facing the people in the wagon and was throwing his hands as though he were making a signal to stop. He was facing the people in the wagon and seemed to be making the motion to them. I could not tell exactly what the people in the wagon were doing. From what I could see, two were seated on the seat in front, and the other one, standing behind, looked like he had his hands on the shoulders of the others. I could not tell who was driving. The horses had just gotten on the track when they were struck about the shoulders. The engine came on down and stopped at the usual place.

Cross-examination:

128 The engine stopped at about its usual stopping place. I don't know for sure whether I heard any signals for the crossing. I know W. E. Maynard and C. C. Highsmith. I remember meeting them in the rear of Mr. Harkrider's store. I do not remember telling them that the train was running 40 miles an hour. I told them that the train was running pretty fast, but that I had no way of judging what the speed was. I have been switching off and on for about four years and a half. Of course, I have some idea of the speed of trains, but I cannot say at what speed this train was running. I believe that if the train had been running at the rate of 35 or 40 miles an hour when it passed the crossing it could have stopped at the depot.

Redirect examination:

If the train had been running at any very great rate of speed at the time it passed the crossing, it would have caused a shock tending to throw the passengers forward to have stopped at the depot.

Testimony of Henry Spicer.

HENRY SPICER, being sworn, testified as follows: I am a switchman and am in the employ of the defendant company. At the time of the accident under investigation I was standing in front of the depot. I heard the train approaching. I heard the train whistle. The first whistle that I heard was two long and two short whistles. After that I heard it give a long whistle, and after that I heard two long and two short whistles again; I am sure of this. I saw the accident. I just could see it and that was all. My attention was called by some one who said, "Look there, look there," and I turned and looked at the crossing and the team seemed right on the crossing, and just as I saw the team that instant the engine hit it. I was on the depot platform. The train made the usual stop at the station. It looked to me like the horses were standing very near the middle of the track when they were struck. They were thrown to the east side of the track. I could form no idea of the speed at which the train was running. I do not remember seeing Mr. Reese at the crossing.

Cross-examination:

I heard the whistle sounded at three different times, as above
stated; I am sure of that. I was not paying any special at-
129 tion. Trains come in every day and sound these whistles. I
was at the same place the day before. I could not say whether the train that came in the day before sounded the same whistles or not. I could not swear positively that the train that came in the day after sounded the same whistles or not. I am still in the employment of the company and am up here on a free pass.

Redirect examination:

The fact of the accident would naturally impress the circumstances of that particular day on my mind more than others.

Testimony of R. B. Painter.

R. B. PAINTER, being sworn, testified as follows: At the time the accident occurred I was standing somewhere near the north end of the passenger depot in Smithville. I heard the passenger train approaching from the north. I heard it whistle. I heard the road-crossing whistle and the whistle for town. I cannot state as to whether the bell was ringing or not. I saw the men in the wagon drive right up on the track in front of the train and get killed. When I first saw them they were within a few feet of the track and were just driving on the track. They seemed to be urging their

horses right up on the track. I could not see that they were whipping them, but they seemed to be urging them. I only saw the two men on the spring seat. I could not say positively how far they were up on the track when I first saw them. They probably might have been three, four, five, or six feet. I could not say positively. I could not say exactly how far the engine was from them at the time I first saw them. It was right close. It might have been 50, maybe 100 feet from them. They appeared to be urging their horses across the track. There is nothing to obstruct the view of parties in a wagon and approaching this crossing of a train approaching the crossing from the north. I could not say exactly how far northward from the crossing a train could be seen, but I should think about 300 or 400 yards; at least that. As they approach the crossing from the south for a distance of 300 or 400 yards, they could all along see a train approaching from the north for at least 300 or 400 yards. That would be my judgment. I lived at Smithville four years.

Cross-examination:

130 I am in the employ of the company and have been ever since I have been in Smithville. The only whistles I heard were those mentioned—first the long blast for the station and two long and two short blasts for the road crossing; these were all I heard. When I saw the animals they were in four or five feet of the track. I made a statement to Mr. Penn of what would be my testimony in this case. I am up here on a pass and am going back on a pass.

Testimony of Sam. Standifer.

SAM. STANDIFER, being sworn, testified as follows: I reside at Smithville, and was at the depot at the time the accident occurred. I saw the accident. At the time when I first saw the wagon it was somewhere near the foot of the dump. At that time the train was somewhere about the bridge. The locomotive was right along there about the bridge or the tank. At the time I saw the wagon and team they were driving along. The team did not appear to be frightened, and they continued to drive along up to the crossing. There was nothing to obstruct the view of the occupants of the wagon and prevent them from seeing the train, that I know of.

Cross-examination:

I have lived at Smithville since the 1st of January. Prior to that I lived at Elgin for three years. Before living in Elgin I lived at Smithville. Before first coming to Smithville I lived at Taylor. I went to Taylor from Elgin. I started at Elgin and belong there. I am a proprietor of a saloon. I have been a bartender. At the time of the accident I was standing about the bay window of the ticket office. When I first saw the team the engine was along about the bridge. The team at that time was at the foot of the dump. I observed the team as it went up the dump. I stood there and looked at it. When I first saw the team at the foot of the dump the en-

gine was along about the bridge somewhere; it was along there somewhere. I could not say how much beyond the bridge it might have been. I did not notice that the team was frightened as it came up the dump. I did not see the mule set back and shy over to the right. I did not see the team come to a stop when they got on the dump. I would not swear that it did not, but I did not notice
131 it. I was in conversation with Mr. Johnson and Mr. Dechert at the time the accident happened, and I suppose that is the way the company found out what I knew. The first parties that interviewed me about this matter was Mr. Maynard and Mr. Highsmith. After that Mr. Penn saw me. He asked me some questions which I answered, and he wrote out the answers and I signed it. He took the paper and I have never seen it since. Transportation here was furnished me by the defendant company.

Redirect examination:

When Mr. Highsmith interviewed me he told me he did not want me and told me that he did not need me. I was born and raised in this county and am a son of W. B. Standifer. I am a grandson of Jacob Standifer.

Recross-examination:

When I first saw the wagon approaching the crossing the horses' heads were near the foot of the approach or dump. They did not misbehave and went straight over the crossing.

The written statement of the witness above referred to is here introduced in evidence and is as follows:

SMITHVILLE, *May* 9, '99.

When the accident occurred at the crossing north of the depot, at Smithville, I was on the depot platform. Conductor Johnson called my attention to it. When I looked in that direction the wagon was near the track—probably five or six steps away. The approaching train was near the water tank. As the team approached the track they seemed to check up. The men in the wagon seemed to pull upon the lines. As I understood from the manner of the men, it was to make the team go on. They were driving very leisurely along, and seemed to be in no hurry. The men did not look toward the coming train. If they did, I could not see that they did. I know the train whistled for town because I heard it. I am not certain as to whether it whistled for the crossing or not, nor can I tell whether the bell was ringing. I do not know any of these men personally. I saw Ashley some time in the afternoon, but did not know at the time who he was. I had no conversation with him and cannot say what his condition was with reference to being under the influence of liquor. I do not know what called my attention to him.

(Signed) S. B. STANDIFER.

132 *Testimony of A. T. McCasland.*

A. T. McCASLAND, being sworn, testified as follows: I live in Smithville, and my business is that *on* an engineer. I run a switch-engine in the Smithville yard. It is my duty to take the switch-engine and take the last car off of the afternoon passenger train. This was my duty on the 28th of January last. My engine, preparatory to the performance of that duty, stood on what we call the Y, which is a track north of the passenger depot and west of the main track, with which it connects near the wagon crossing. At the time the passenger train came in on the 28th the switch-engine stood clear of the main line. I could not tell the exact distance, but it was 50 or 60, maybe 70, feet from the crossing. This was the place where the switch-engine usually stood. This had been the custom since I have been running it, which is about Nov. 1st, 1898. At the time No. 3, the south-bound passenger, approached I was sitting on the engine waiting for its arrival, in order to take off the last coach. I was the engineer in charge of this engine, and was sitting in the cab, on the right-hand side, which is the usual and proper place for the engineer. I suppose we had been there about 20 minutes before the arrival of the passenger. That is about the usual time. There was no steam escaping from the switch-engine. I always guard particularly about that. It is against the rules to have any noise from the engine when you are working a passenger train and are in the vicinity of road crossings. I don't know that there was any smoke escaping from the stack. No more than could be avoided. Of course, an engine with fire in it is bound to have some little smoke. There was no more than could be avoided. The engine was not making any unusual noise of any kind. It was standing there as quiet as an engine could for 20 minutes. It was standing perfectly still; no noise that I know of. It was standing as quiet as an engine could that had fire in it. The steam was shut off, and there was none escaping. I heard the passenger train whistle for the station. I do not remember that I heard any other signals. I was watching for the approach of the train, so as to prepare for my customary
133 duty. When we heard the train whistle we got ready to do our work, and if it whistled any more, I did not hear it. I never paid any attention. I knew the train was coming, and got ready to do our work. All I saw of the accident was I saw the team struck. That was all. Everything was on the opposite side of the train from me, and I could see nothing until the train passed.

Cross-examination:

I state that the switch-engine was standing from 50 to 70 feet south of the crossing, on the Y. This Y makes off from the main line to the west. It is, I suppose, 200 or 250 yards long. It was possible, certainly, for us to have stood the engine further away from the crossing than we did. The station whistle that I heard was up about the curve at Kite's house. I suppose it whistled at the whistle-board. If there had been any whistle for the crossing it would have sounded

after the station whistle. I did not hear the whistle for the crossing. The crossing signal, if given, would have been closer to me than the station whistle. From where I was sitting on the engine I could not see the passenger engine until it got in ten feet of the crossing, and when I first saw it said engine was about that distance from the crossing. I suppose it was going at the rate of 18 or 20 miles an hour. I just guess at it. I could not say that it was going from 20 to 25 miles an hour. I don't know. A man gets fooled standing that way and seeing it pass. I am just guessing at it. I don't say that it was not running that fast. I don't know. I don't know and can't say whether any effort was made by the engineer of the passenger train to stop the same. I don't know and cannot say. I did not see any effort made. The train came right on to the station before it made a stop. I don't know whether if the emergency brake had been applied it would have come on as it did or not. I was never an engineer on a passenger train. The emergency is when you use all the brakes with all the power you can get. If all the brakes had been good and the emergency had been applied I don't suppose the train would have made the stop which it did. When I saw the team it was right on the crossing. The only person that I conferred with about this matter was the fireman on my engine. I don't know what statement he made about it. I am still in the employ of the company; came over here on a pass and expect to go back on one.

134 *Testimony of J. E. Roberts.*

J. E. Roberts, being sworn, testified as follows: On the 28th of January, when the accident occurred at the crossing, I was at work on the switch-engine which switches the last car off of the afternoon passenger after it comes into the depot. I have been engaged in that service of taking off this coach for about two years, during which time it has been customary for the switch-engine to take off this coach in the manner that we did on the afternoon of the accident. I was firing the switch-engine during all that time, and was doing so on the afternoon of the accident. On that day the switch-engine was standing south of the crossing, on what is known as the Y. It was from 60 to 75 feet from the crossing, at the place where it was usual and customary for that engine to stand, and where it had stood every day for two years prior to the date of the accident. I was sitting on the seat box on the left-hand side of the engine. The engine was not emitting any steam. There might have been some smoke escaping from the smokestack, but it was very little. The engine was quiet. It was as quiet as any engine could be standing still. I heard the south-bound passenger whistle for the station. There was one long whistle. All I saw of the accident was I saw the engine strike the team. There was a switchman attached to our engine. His name was Clyde Reese. Just prior to the approach of the passenger he was standing at the switch-board, just north of the crossing, and was there at the time of the collision.

Cross-examination:

From the position where I was sitting I could not see the wagon. The team was right on the crossing as the engine hit it. It looked as if it had just stopped. I did not see the men on the wagon. I do not know how long they had been stopped. The switch-engine was standing from 20 to 25 yards from the crossing. It could have stood further away. The Y on which it stood runs out as much as 100 yards, and the engine could have stood 100 yards away from the crossing. When I first saw the engine and passenger train it was just coming around the curve. I mean by that the first curve to the left above Mr. Kite's. I am still in the employment of the company. I don't know how fast the train was running at the
135 time it struck the team. It was about 16 miles an hour, I guess. It would be hard to judge of the speed of a train coming towards you. It was from 16 to 18 miles an hour. According to my judgment it was about 16 miles an hour. I might be mistaken, and it might have been from 18 to 20 miles an hour. I did not see the horses and the train at the same time. I saw the team just as the engine struck it, but I saw the engine before it got there.

Testimony of S. H. Spangler.

S. H. SPANGLER, being sworn, testified as follows: I live in Smithville, and am foreman of machinery for the defendant railway at that point, and have occupied that position during the past three years. My duties in such position are to look after matters pertaining to the motive-power department—the care and management of the locomotives and employés of that department. My age is 41 years. I have recently made two separate tests with locomotives, standing near the water tank above the crossing, to ascertain whether an engineer at his proper place on the right-hand side of an engine approaching the wagon crossing where the accident occurred from the north can see parties to the left of that crossing. We found that when the tender of the locomotive was on the bridge and the engine off the bridge, a distance of about 335 or 340 feet from the crossing, and object coming up at the left-hand rail would become obscured to the engineer. The range of view would be shut off at that point. The bridge is about 215 or 225 feet long. On the approach to the bridge from the north he could see a wagon or object at the foot of the dump, and from that point northward, a distance of 1,000 or 1,500 feet, you can see an object on the road coming down anywhere from Main street. Shortly after you leave the bridge—that is, from 100 to 150 feet north of the crossing—there is a curve in the track. The curvature is about eight feet off of a straight line towards the left. This would tend to obstruct the view of the engineer on the right-hand side, and from the time that you leave the bridge the engineer, sitting on his proper place on the right-hand side, could not see anything on the left-hand side of the track at all. If the engine was standing just off the bridge
136 on the south side, the tender being on the bridge and the engineer sitting in his proper position where he can reach the

throttle lever and brake lever, he could not see a team coming up the incline or dump on the left-hand side of the track—that is, the east side—until after he had gotten upon the track. When the engine is at the tank the same state of affairs exists, because he is on the same straight line here that he would be at the bridge. The curve begins a little bit south of the tank, and he has the disadvantage of the full curvature of the track. As he comes off the bridge he begins to lose sight of an object at the crossing, and when he reaches the tank his range of view is completely cut off. The entire crossing is not obscured, but the greater part of it. He could see a man about the center of the track, but could not see to the left of the track. He could not see a wagon and its occupants to the left of the track. These observations were made at both of the tests that I have mentioned. The engineer's view is cut off by the various attachments of the locomotive which obstruct the view to the left of the locomotive going southward. These obstructions are the cab, sand box, dome, bell, headlight, boiler gear, &c.; all these things obstruct the view of the engineer sitting upon the right-hand side of the engine. I am familiar with this wagon crossing and the locality. A person approaching the crossing where the accident occurred from the south has an almost uninterrupted view of the track from Main street northward for nearly 3,000 feet—that is, from where he turns out of Main street into Front street, along which he would travel northward to reach the crossing. From that point he could see a locomotive coming around the curve, north of the crossing, at least 3,000 feet away. This unobstructed view obtains all the way from this point up to the crossing. Proceeding northward along Front street, you have at all times, as you follow the travelled road or street, a clear unobstructed view of the track northward of the crossing to the curve, which is about 2,000 feet north of the crossing. At the switch which leads to Dr. Powell's gin, which is about 185 feet south of the crossing, you have a plain view of the railroad track north of the crossing for about
137 2,000 feet—that is, up toward the curve. Just after crossing this switch there is a slight depression in the road, but the view is in no manner obstructed or interfered with, and from this switch on up to the crossing all the way you can see uninterruptedly up the railroad track for a distance of from 1,800 to 2,000 feet. Near the city bridge on the east of the railroad track, north of the crossing, there are two trees, but they are not on the right of way, and there are also some bushes growing on the east side of the right of way, but they interpose very little obstruction to the view. Any one could see what was coming down the track if he would look. The two trees mentioned are trimmed off somewhat and are off the right of way on Gazley's creek, between the railroad bridge and the city bridge. They interpose no serious obstacle to the view and would not shut off the sight of the train. On the 28th of January last there was no foliage upon these trees. I was at the crossing last week. I stood at the bottom of the crossing and looked for the express purpose of seeing whether there were any obstructions to the sight and I found none there; nothing to hinder one from having a

clear view of the track. The trees and bushes mentioned interposed no obstacle to the view. On the 28th of January last there would have been even less obstruction than at the present time. The bushes mentioned are a small bush or shrub that grows about eight feet in height, growing along the surface of a bank that had been left from a former excavation, which I understood was used for digging out dirt for the brick yard, and is along the side of the right of way. It is a kind of mesquite or acasia bush. I have heard it called the wesatche. They are outside of the line of telegraph poles and I presume are off the right of way. They present no obstacles to the view of a person approaching from the south, because the train coming down the track from the north goes down an incline till it comes down to the bridge, and the engine is on higher ground than the bushes, and one standing at the crossing can see an engine coming down there without difficulty. This is the case before you start up the incline or dump to the crossing. I took my observations standing anywhere in the
138 roadway in which wagons travel from the south to the crossing, and I found the view was unobstructed. From the Powell gin switch continuously up to the crossing you could see from the crossing northward on defendant's track for 1,800 or 2,000 feet. When I made these observations I was walking. A person in a wagon approaching the crossing could naturally see better than one walking, because they would be higher, especially so from the Powell switch to the crossing. From the Powell switch to the crossing there is a declivity, I should think, of about three feet. The road from that point to the crossing runs parallel with the railroad track till it comes to the foot of the crossing, and the turn for a wagon to go on the crossing would be made at a point about 55 feet distant from the center of the track. You go from the Powell switch northward in a straight line parallel with the track till you arrive at a point at right angles with the track and about 55 feet away; then you turn and go up the incline onto the crossing. The bottom of a wagon bed is about three feet and a half from the ground. The side boards are about twelve inches high, and the seat, I should think, about eight inches, making in all about five feet. The depression after one crosses the Powell switch is about three feet. If a man of average height was standing up in the wagon bed the range of his vision before he went down in this depression would be about nine feet above the level of the ground. After crossing the switch he would go down about three feet, and that would reduce the range of his vision to that extent, or about six feet, till he got to the crossing. The man was standing in the wagon. Even after going down this declivity of three feet his range of view would still be about five feet above the level of the track, and his view of the crossing and northward therefrom would be better than a footman's further back towards Main street.

Cross-examination:

When an engineer is at his proper position on the engine—that is, on the right-hand side—and the engine stands just off the south end

of the bridge, he loses sight of an object approaching the crossing on the left-hand side—that is to say, the object would have to
139 come just over the left-hand rail in order to come into view of the engineer. If a man was in the act of stepping over the rail he could see him. This point is about 335 or 340 feet north from the crossing. As you recede from that position going northward, the view of the engineer enlarges on the east or left-hand side of the crossing. If the engine continues to back towards the north the view continues to widen and he finally gets the full view of the approach, clear out to the right of way. An engineer rounding the curve with an engine could see the entire approach to the crossing. The curve is about 2,000 feet from the north to the crossing, and as the engine comes southward from the curve the range of view of the engineer continues to narrow until it reaches the point just off the south end of the bridge, where it is shut off altogether, as above stated. After the engine gets down about the whistle board he begins to lose sight of the wagon road, and when he reaches the north approach to the bridge he begins to lose sight of the dump, and when he gets over the bridge he then loses sight entirely of the approach to the crossing. This is true only with reference to the engineer. The fireman has a full view of the approach all the way down. After the engine has rounded the curve he has nothing to obstruct his view. He has a clear view all the way down a distance of about 2,000 feet. A person traveling on Front street northward to the crossing would have a clear view of defendant's track from the crossing northward from the time he reached a point 1,000 feet south of the crossing and continuously thence until he reached the crossing. The engine would have to round the curve before it could be seen by such person. If a wagon were at this point, 1,000 feet south of the crossing, and an engine at the curve 2,000 feet north of the crossing the engine would have passed the crossing a long time before the wagon would reach it. If a fireman should see a person on the crossing or approaching the crossing whom he thought in peril, it would be his duty to call the engineer's attention to that fact, and it would be the duty of the engineer to act on the information received from the fireman. If a train were running 40 miles an hour, it would take 30 seconds to cover one-third of a mile.

140 *Testimony of Ledlie Arnold.*

LEDLIE ARNOLD, being sworn, testified as follows: I live in Smithville with my mother and have lived there about four years. On the 28th of January, the day of the accident, I was working at the furniture business for Mr. Mitchell. Just prior to the accident Tom Bradley and I had been over to a colored fellow's house to deliver some furniture. We were in a delivery wagon and were approaching the crossing where the accident occurred from the west side. We were going back to town. We both heard and saw the approaching train. We were at the foot of the dump on the west side of the track when we saw the train and heard it whistle. We crossed the dump, passed over the track, and got on the other side

and saw the two Ferris and Mr. Ashley approaching in a wagon. When I first saw them they were just this side of the gin. They had just crossed the switch that went down to the Powell gin. They were going in the direction from which we had come. There were three men in the wagon; two men were on the seat; one man was standing up, either behind the seat or in front of it. We went down in such a hurry I could hardly tell which. I saw these men as they approached the dump. As they reached the dump we had passed them and were on the other side of them, right about even with the seed-house. As they drove up on the dump the horses got scared at the approaching passenger train. The switch-engine was too far to scare them, and the horses stopped and they rushed them across, trying to rush them over the crossing. At the time they drove up on the dump the passenger train was about half ways from the curve to the bridge, and as they got up onto the dump the train was at the south end of the bridge, even with the water tank. They were trying to rush the horses over the crossing. I know Clyde Reese; I saw him there at the crossing. He was standing pretty close to the crossing as we went over.

Cross-examination:

We had been across the track to deliver a bedstead at a colored gentleman's house. I could not tell the colored gentleman's name; it has been so long ago. I know him, but I don't know his name. I think it was a bedstead and a bureau. I am certain of that.

Tom Bradley would know the name of the party. He
141 knows all the darkies. We were going to town after delivering the furniture. It was a reasonably steep crossing. We were in a hurry and drove fast. We were driving a very large horse—a good trotter. He made good time. We were going back to town, and were in a hurry to get there. As we went down the dump they were about twenty feet from the bottom of the dump, on the east side. As we passed them I was driving and looking back all the time. My attention was attracted because we saw them going up to the crossing and saw the train coming. I saw the train on the track. When I first heard it we had not passed over the crossing. We stopped, and Bradley took the lines and I got the whip and we went over. I stopped and wanted to stand still, but Bradley took the lines. I whipped and he drove, and we passed over. We whipped the horse across the dump, and after we got across we were as much frightened as them fellows who went up, if they were frightened any at all. We were frightened going over the crossing, because when we started to cross I was afraid the train would catch us. I heard the train whistle once. I could not tell what signal it was. I could not tell whether it was a long or a short whistle. At that time we were at the foot of the dump, on the west side of the track. We whipped up and crossed over and passed these men. When we first saw the passenger engine it was coming around the curve. We were on the other side of the dump. I could not say how far. We started up on the dump when we heard the

whistle. I expect we were going down the other side when we first saw the train, which was then on the other side of Mr. Kite's. The reason we were afraid of that train running over us is because anybody will be afraid on the track when a train is coming. I did not tell these men the train was coming. I did not have time. *I did not tell these men the train was coming. I did not have time.* I did not say anything to them. I was driving too fast. I am now working for my brother in Smithville, as a painter. I don't know how the railroad people found out what I knew, unless Mr. Peeples told them. I told him about it, and he took the wagon and went down there. No, sir, I have not got the times mixed. This was not a different time from the time the men were killed. The mule was setting back. He set
142 back till they whipped him. He was not leaning over towards the bay horse, that I could see. I am not certain which side the mule was on, but I think he was on the left-hand side and the train was on the other side. The horse was between the mule and the train. I don't know that either the mule or the horse was scared. The switch-engine was not a heap closer than the passenger engine. The passenger engine at that time was about as close as the switch-engine. There was not much difference. The passenger was at that time at the far end of the bridge. It was on the bridge at the time the mule first began to misbehave. When the mule first began to misbehave, when it first got on the dump, the train was above the bridge. I don't know how far. It was 70 or 80 yards. I don't know how far the passenger engine was from the crossing. It was as far as the end of the bridge. The switch-engine was about 500 feet from the crossing. No one in particular has been talking to me. Mr. Penn came down and got what I knew and set it down and I signed it. I have tried to state the matter as I wrote it down to him. He has been to see me once. The railroad company furnished me a pass to come up here. When we passed the parties they were 20 feet from the foot of the dump.

Testimony of Tom Bradley.

TOM BRADLEY, being sworn, testified as follows: I have lived in Smithville all my life and live there now. On the day the accident occurred I was working for D. J. Mitchell, and, in company with Liddlie Arnold, had been to deliver some furniture over on the west side of the track and were coming back to the east side. I don't remember the name of the party to whom we delivered the furniture. We went over the crossing on which these men were killed. Lidlie Arnold and I were in a delivery wagon. I heard the passenger train come in. I heard it whistle for the station. We were on the west side of the track, coming towards the crossing. We were 100 or 200 yards distant; it might have been further. Lidlie and I hurried on and got across the track. We hurried so that we would get across in time to keep the train from catching us. I knew the train was approaching. I could hear the noise of the train
143 and heard it whistle. We passed over the crossing. After we got across we saw the parties who were injured approach

ing in the wagon. They were near the gin when we first saw them between the gin and the railroad crossing. I don't know how far they were from the crossing. It might have been 50 yards. I saw them as they started over the crossing. A little before they got to the dump the switchman hollered at them for them to go back, and they checked their team up, and one of them went to whipping them, and by that time the passenger train was at the tank, and by the time they got on the track the train ran into them. The switchman hollered at them a little before they got to the dump. They checked up, and then one of them went to whipping the horses. I don't know which one of them it was. At that time the passenger train was about the tank. They whipped up their horses and the train ran into them. I was about fifty yards from them when I saw this. The switchman hollered at them to go back, and they checked up. The switchman was standing between the main line and the branch where the switch engine was standing. I don't exactly know how far he was from the crossing. He might have been 25 yards, and he might not have been so far. I don't know his name. I went back up there after the collision. I saw a bottle of whiskey lying by Mr. Jim Ferris, the party who was killed.

Cross-examination:

It was a quart bottle about one-third full. I am not certain that it was whiskey. It was liquor of some kind. I did not taste it or smell it. It looked red. I was taking the furniture to a dwelling-house; I have forgotten what kind of a house it was. I do not know the name of the man, but I think it was a white person. I do not remember the kind of furniture it was. Lidlie Arnold was with me. The house was a long ways on the other side of the track. As we went out to deliver the furniture we passed over the crossing where the men were injured. The house to which we took the furniture was located near that of Mr. Weston. I don't remember what kind of a house it was, but think it was a one-story house. It was about 200 or 300 yards northwest from the coal chute; maybe not quite so far. I don't dispute that we went the far way to
144 get to this house. We went around by the gin. It is not true that when we first heard the train whistle we were just leaving that house. When we were coming onto the crossing we heard it whistle; we were a good ways from the house; we were between the Katy main line and the Lockhart branch; we might have been 100 yards from the crossing when I heard the train whistle. It might have been a little further. I suppose the train was about at the curve where it always whistles. We were traveling along the wagon road. Lidlie Arnold said, "Let's stop," and I said we had plenty of time and we rushed across. We did not stop at all. I told him to let's go across and we went across. He was driving and I had the whip in my hand. I whipped the horses and he held the lines. I hit the horse two or three times and then put the whip back. I could not see the train until we got on the dump. It was on the other side of the bridge, between the bridge and the

whisting station. It was closest to the bridge. It was between the two and on the other side of the bridge. We saw the train when we got up on the track. After we got on the other side of the crossing and drove a piece we stopped. The men who were injured when we first saw them were crossing the little branch that goes around to the brick yard. They were not very far from the crossing; about fifty yards. We never did exactly pass them. They were coming on when we stopped. We did not go the way they came. We stopped on the straight road towards the river. We never went the road they came. We were going on the street towards Powell's gin. We went about 50 or 75 yards and stopped. We stopped to look at the train, and I said, "Lidlie, look yonder; them fellows are going on there and the train is going to hit them." I do not stop every time I see a train, but just happened to stop this time, and that fellow hollered at them. Lidlie did the driving. Lidlie had the lines and we looked back and a fellow commenced hollering at them, and that drawed our attention more. I did not hear him holler till we got on this side of the crossing; that was when the fellows were coming up near the dump. We did not stand there any time till the train struck them. We went back where they were. We tied the horse for a few moments, and then Lidlie took the horse on back and Mr. Peeples came back with the wagon. Mr. Reese, the switchman, was down by the switch-engine, which was about 25 yards below the crossing. When the mule and horse were going up on the dump they acted like as if they were scared. I suppose they were scared at the train which was coming towards them. I could not swear at which engine they were frightened at. I don't know which side the horse was on nor what they were scared at; they were frightened a little. The driver did not hold the lines very long before the train struck them. I think the three men were riding in the seat. I know they were all three in the wagon. We had stopped when they were going up the crossing; we had been standing still about 15 or 20 seconds; it might have been 30 seconds. I heard only one whistle—the station whistle; that is the only one I paid any attention to.

Testimony of Ben. F. Wilson.

BEN. F. WILSON, being sworn, testified as follows:

I reside in Smithville, and have lived there ever since August, 1894; my home and property is there. I am general yardmaster there in the service of the defendant company, and have been so employed since August, 1894. I was at the depot at the time of the accident inquired about herein. I was there for the purpose of seeing to the passenger train and having an engine changed and taking off the car; that is a part of my duty. I heard the train approaching. At the time I was looking down the track. I had an engine down back on the Y and wanted to see if it was lined up and if the switches were set for it. I don't remember whether I heard the train whistle. I saw the wagon as it went up on the crossing. I was on the north end of the depot platform. As the wagon approached

the crossing the train was about on the bridge and its south end towards the tank. When I first saw the wagon the horses' heads were within eight or ten feet of the track. Just about that time the team set back, and they seemed to make a jump just as the engine got there, and that is all I saw. Before going on the track they seemed to make a momentary stop; whether the driver pulled the team back or not I could not say; it set back near the center of the track,
146 and the pilot of the engine struck them, and the wagon was thrown around into the train. The train made the usual and ordinary stop at the station. I am familiar with this crossing. A party approaching that crossing can from the time he strikes the right of way see a train coming from the north up to the curve—that is, between a quarter and a half a mile. When I first saw the horses their heads were right near the track, about eight or ten feet distant. Just about that time the horses set back. Not more than ten seconds elapsed from the time I saw the team until the accident happened. I would judge when I first saw the team the engine was on the bridge, at the south end. I did not see the horses when they started up on the dump and do not know how they behaved. I did not see the negro boy and the white boy approach the crossing from the west in the delivery wagon.

Testimony of I. M. Veasey.

I. M. Veasey, being sworn, testified as follows: I live in Smithville and have resided there about four years. I am an alderman of that town and have been for about three years. I am employed by the defendant railroad and have charge of the car department as inspector. I was on the depot platform at the time of the accident at the north end. I saw the wagon containing the parties who were injured as it approached the crossing. When I first saw them they were going northward on Front street. They were, I suppose, about 150 or 200 feet from the crossing. I saw the train as it approached from the north; I also heard it. I heard it whistle for the station. I saw the wagon proceed down the street and turn up on the crossing. I did not notice but two men in the wagon. The team seemed to be moving along in a kind of rapid walk. It looked to me like they were kind of prancing around a little. When they turned up on the dump and got partially up the team stopped. The engine at that time was on this side of the bridge, past the tank. The train itself was back on the bridge. The engine was south of the tank. The train, of course, extended further back. At that time the team seemed to stop. They drove up on the dump, and the team seemed to stop just
before they came up to the road proper, and then appeared to me
147 that the team was urged on by whipping with the lines or something of that sort. I don't know whether they had a whip or not. They seemed to be whipping with the lines. The team lunged forward right ahead of the engine; it seemed like the pilot of the engine shot right under the team. The wagon was torn all to pieces. The horses were struck. I don't know whether it struck the wagon or not. The train made the usual stop at the station.

Cross-examination:

I heard only one whistle; that for the station. I heard no whistle for the crossing. My attention was attracted by the whistle, and I noticed the engine coming out of the cut. At this time the wagon and team were on Front street between the spur or switch leading down to Powell's gin and this crossing. They were going along in a jog or trot. The collision seemed to knock the mules as high as the smokestack of the engine, which was ten or twelve feet high. I did not see the men go up in the air. I have no recollection of seeing anybody at the railroad track just before the collision. I had been on the platform some time, having come down there to meet this train. I was there when it whistled. I did not see the white boy and the negro boy approach the crossing from the west after I heard the train whistle.

Testimony of W. L. Johnson.

W. L. JOHNSON, being sworn, testified as follows: I am conductor for the defendant road and have been for the past ten years. My headquarters are at Denison. I was standing at the north end of the depot platform at the time of the accident. I saw the train approaching; I heard it whistle. It whistled first for the station, and when it drew a little nearer it whistled for the crossing. I saw the wagon before the accident. It was driving along up Front street beyond the railroad crossing. I could not tell how many men were in it. About the time the train whistled I noticed the wagon driving up towards the crossing, and, as the train drew nearer and after it had whistled for the street crossing, I noticed that the wagon kept on driving towards the crossing in pretty lively trot. I was going to take charge of the same train and go south with it, and was talking to a couple of friends, and, as the train drew near
148 and the wagon drew near to the crossing, I called the attention of Mr. Decherd and Mr. Standifer by saying, "Look yonder;" and they kept drawing nearer and nearer, and I made the remark, "Look yonder; those fellows are going to get struck;" and then, of course, they were pretty close together, and when the horses came up close to the crossing they came to a stop, and the driver raised the lines and slapped them on the back with the lines, and they sprang forward, and just about the time they got their feet on the inside of the rails the engine struck the horses about the shoulders and knocked them off the track and threw the wagon into the side of the train. I could not say how close the train was to the crossing at the time the wagon started up on the dump, but it was pretty close to the horses. The horses came to a stop, and the driver raised the lines and struck them. At the time the wagon started up on the dump the engine could not have been more than 200 or 300 feet from the crossing. The horses went up to the dump in a trot until they came to the crossing and stopped, and then he slapped them with the lines just in time for them to get their front feet on the track. When they were struck with the lines they sprang forward quickly. If they had not sprung forward, I don't think the

collision would have occurred. They were on the outside of the track, and if they had not sprung forward at the time he slapped them with the lines, they could not have gotten in front of the engine. It is natural to suppose that this slapping them with the lines is what made them spring forward. I know where the tank is north of the crossing. I am of the opinion that the engine was south of his tank at the time the wagon and horses started up on the crossing. That is my best judgment. You can see very plainly from the foot of the dump up to the curve. From the foot of the dump to the curve is from half to three-eighths of a mile, and you can see a train approaching for that distance.

Cross-examination:

When I first saw the wagon they were approaching the crossing in a good, fast trot. They were close to the foot of the dump. I did not measure the distance, but it must have been some-
149 thing like 60 or 70 feet from the foot of the dump to the crossing. I could not tell how far they were from the foot of the dump. I never noticed that the team shyed at all until they came to the railroad. If there was any shying before that time I did not notice it. The only time I noticed any was on top of the dump. It looked to me as though they were ready to step over the rails. I did not notice any shying; they just stopped. I did not notice the mule swerve over next to the horse. At that time the engine was approaching the crossing. It was not as far back as the tank. I cannot make any estimate, but it must have been 100 or 200 feet from the crossing; that is what I would judge from where I was standing, which was some distance away. I have been a conductor now for about ten years, and a passenger conductor for six years. My run for a while was from Taylor to Houston; part of the time from Smithville to Galveston; part of the time from Denison to Taylor, and part of the time from Houston to Hillsboro. A train running at six miles per hour could be stopped pretty quick, but I am not an engineer and could not tell exactly. I am not responsible for the handling of trains. This is the engineer's duty. The train which collided with the wagon was fifteen minutes late, according to my recollection. It is not true that if this team had not stopped and set back that it was possible for them to get across before the train struck them. I don't think they could have got across. The engine was too close to them. I did not notice that the engine made any check. It ran on into the station. I did not see any persons approaching the crossing from the west after the whistle sounded. I did not pay any attention to that. The train made the ordinary stop at the usual place.

Testimony of W. D. Springer.

W. D. SPRINGER, being sworn, testified as follows: I reside at Smithville. My occupation is that of a car repairer. At the time of the accident I was standing on the platform just south of the depot corner. I heard No. 3, the south-bound passenger train, as

she came in and heard the whistle sound for the town. I never heard any other whistle. I saw the wagon before it was struck.

When I first saw it my attention was attracted by hearing
150 Mr. Johnson call out, "Look yonder," and when I looked it seemed to me that the horses were not more than six or seven feet from the track, and the approaching train did not seem to be over 20 feet distant, and just as they got on the track it struck them. When the horses' heads were within six or eight feet of the rail the train was within 20 feet of the crossing. It did not look to be over that. The parties in charge of the wagon appeared to be slapping the lines. The horses just walked right along and came in contact with the locomotive before they could get across. The wagon was thrown around to the side of the train.

Cross-examination:

When I saw them the horses were not going fast. They seemed to be going very slow. They were not misbehaving at all. The driver was urging them on with the lines. When I first saw them their heads were in six or eight feet of the rails. At the time I saw the switch-engine standing there to the south of the crossing. I did not see anybody go across the crossing from the west side just before the accident. I was watching for the accident, as I saw it was going to come off. I did not see any negro and white boy come up from the west and go over the crossing. I am an employé of the company and am here on a pass.

An Agreement.

It is agreed in open court that Mr. Mitchell, the owner of the furniture store referred to by Lidlie Arnold and Tom Bradley, is not now in Smithville and is out of the county.

Testimony of Clyde Reese.

CLYDE REESE, being sworn, testified as follows: I live in Smithville. I have lived there about eight months. My occupation is that of a switchman, and was so employed on the day of the accident. At the time the accident occurred I had been employed on the switch-engine that stood on the Y near the crossing. I had been sitting on the foot-board of the engine. I heard the train as it approached from the north. My attention was attracted by the whistle of the engine. I heard the station whistle. I did not hear any other whistle. At the time I heard the engine whistle for the station I was standing pretty close to the switch-engine. As the
151 passenger was coming down I noticed these men and wagon go up close to the crossing, and they hesitated like they were going to stop and did come to a stop. Just about that time the driver hollered, "Get up," and they went upon the crossing and the train hit them. At the time I was standing right in the middle of the road at the crossing. I attempted to prevent them from coming on the crossing, and hollered at them twice to look out. The first

time I hollered at them they were at the foot of the incline that comes up to the crossing. I hollered at them twice and told — to look out. The second time I hollered at them they were going up the crossing. Just as the crash came the driver pulled back and hollered, "Whoa." There were three men in the wagon. Two men were sitting down and one standing up. I could not tell whether they stopped at all when I gave them the first signal. They were about the foot of the dump when I told them to stop. The reason I told them to stop was that I saw the train coming and seeing the danger they were in, and hollered twice, "Look out! Look out!" throwing my hands up. As I did this the passenger train was about the end of the trestle, pretty close to the water tank. Just after the collision a little fellow rode up on horseback and said I hollered at papa and told him not to cross. His words were, "I hollered and told papa not to cross." I should judge the boy to be ten or twelve years old. This was at the time the accident occurred. I could not say how far he was behind the wagon at the time of the accident, but he could not have been more than 30 or 40 feet.

Cross-examination:

My duty was to throw the switch and let the switch-engine out on the main track. The switch stand is 15 or 20 feet north of the crossing, and I had to go up there to throw the switch. My proper position after the train passed was at the switch stand. At the time of the accident I was standing right at the crossing. I never saw a negro boy and white boy cross there before the accident. I heard the train whistle. I saw no negro boy and white boy cross after the train whistled from the west, driving a wagon. When I gave the signals to the parties to keep them back, I was standing on top of the crossing. I did not have my hat in my
152 hand and did not waive it. I did not frighten the team. When I said "Look out," and gave the signal mentioned the horses were at the foot of the dump and just starting up. They were 15 or 20 feet from the crossing. I don't see how the men in the wagon could have kept from seeing me. The passenger train was at that time south of the water tank. I don't know the distance from the crossing, but guess it is about 200 yards. I did not try to take hold of the horses. I could not have taken hold of their bridles and shoved them back. I never noticed the mule shying. It might have done so, but I never noticed it. I never saw the mule shy after the team got about half way up the dump. The team walked right up the hill. They did not stop at all till they stopped right in the middle of the track. When I first saw the wagon the train was up about the tank. The team at that time was at the foot of the hill coming up the dump. At this time I think the switch-engine must have been standing 40 or 50 feet from the crossing. It might have been standing 20 feet from the crossing. I am a poor judge of the speed of trains. I have been a switchman for ten years and have worked for the T. & P. and the M., K. & T. roads in Texas and the Louisville and Nashville out of Louisville, but I am a poor

judge of speed. I saw the engine on the passenger train, but could not judge how fast it was running. I think at the time it struck the crossing it was running from six to eight miles an hour. Considering my bad judgment of speed, it might have been running from 25 to 30 miles an hour. I am still in the employ of the company and am here on a pass. I made out a statement of what I saw at the time and signed it—that is, Mr. Penn wrote it and I signed it.

Testimony of J. W. Slocum.

J. W. SLOCUM, being sworn, testified as follows: I am a fireman in the employ of the defendant company. My residence is Smithville. I have lived there four or five years. I have been firing between five and six years. I was fireman on the locomotive that collided with the wagon on January 28th, 1899. John Pepple was the engineer in charge of the train. The engineer whistled for Smithville station up around the curve. It also whistled for the crossing
153 at the usual place where the whistle board was located. I rang the bell also. I specially remember this because our automatic bell-ringer did not work, and I had to ring the bell by hand. I rang the bell from the time the engine whistled for town till we stopped at the depot. As well as I remember, the engine stopped at the usual place at the depot. A fireman in his proper place sits on the left-hand side of the engine, and the engineer upon the right. I was on the left side upon that day. I saw the wagon approaching the crossing when we were about 75 yards distant. The team was walking along and seemed to be coming towards the road that crossed the track. They were coming from the south. At that time I was sitting on the left-hand side of the engine and we were 75 or 100 yards from the crossing. The team kept coming on till they stopped at the foot of the incline as it turn- up to the crossing. They halted, if they did not come to a full stop. I am satisfied they stopped. They seemed to be looking at us and I supposed they were stopping for the train. I could not tell how far we were from the crossing at that time. It was done pretty quick. The collision occurred a very short time after that, about a second. Our speed as we approached the station, I should judge, was ten or twelve miles an hour. After the parties in the wagon had stopped the second time, and when they hit the horses with the lines, just at that time I hollered at the engineer. We were right up on them then, and the horses being quick, they barely got on the track in time to be struck just back of the shoulders.

Cross-examination:

If I had thought the men in peril, it would have been my duty to call the attention of the engineer, but I did not think they were in peril. When I first saw the team, I could not tell how far it was from the foot of the dump. I guess it was five or ten feet away from the dump; ten feet probably. They were within ten or fifteen feet off the dump when I first saw them and moving in the direction of the crossing. The engine at that time was

75 or 100 yards up the track. I just guess at the distance. At that time I did not say anything to Mr. Pepple, the engineer. At that time the horses' heads were turned north. They were travel-
154 ling northward. Their heads were not turned towards the crossing. The road which passes over the railroad track runs east and west; that on which they were approaching runs north and south. They seemed to be walking along. They halted at the foot of the incline. When I next saw them they were stopped about ten or fifteen feet up on the dump. I did not notify the engineer. The engine at that time was about the water tank, a little closer to the crossing than to the tank. We were running at about ten or twelve miles an hour. They seemed to be stopped and I said nothing to the engineer. I knew that the engineer could not see them. It was after we had struck that I hollered at him. I said, "Look out for the wagon!" or "Look out for the horses!" He did not do anything more then. He had his brakes on at the time. When you have the brakes on or ready you can stop quicker than when you have to apply them. I don't know in what distance a train running ten or twelve miles an hour with the brakes on can be stopped, using the emergency. I have been a fireman for some years, but have never run an engine. I have been firing six years, almost daily, running from Smithville to Houston and from Smithville to Hillsboro. I would make from fifteen to twenty stops between Smithville and Hillsboro and about the same between Smithville and Houston. I have never seen a train stop with the emergency. I never saw the emergency applied. On the day of the accident I stated in a drug store, in the presence of Mr. Bennett, Mr. Long, and Dr. Kerr, as I have stated here, that the second time I saw them when they stopped the horses I only had time to holler "Whoa!" I have never handled an engine only in the yards. I have started and stopped it there. I could stop pretty near where I wanted to. I don't suppose the engineer saw these men before he struck them. When we got down to the station I stayed on the engine—stayed there until we went around to the round-house. Pepples went back to the place of the accident. I don't remember seeing him again that evening. I don't know whether he came back to the engine or not after we stopped at the depot. He might have done so. After the train rounded the curve he was sitting on the box. He did not wash his face on the way down to the
155 depot, nor did I. He did not take off his overalls on the way down to the depot. We stopped at Upton, the station above Smithville. I suppose we were about 18 minutes behind time. After leaving Upton we ran about 35 miles an hour. If I had called the attention of the engineer to the team at the first time I saw it halt at the dump, he could not have stopped the train before reaching the crossing. I could not tell in what distance he could have stopped the train. If he had known the wagon was coming he might have been able to stop.

Testimony of Pike Baker.

PIKE BAKER, being sworn, testified as follows: I reside in Smithville and am acquainted with the railroad crossing where the accident occurred, having crossed it a good many times. After a person had crossed the switch leading down to Dr. Powell's gin south of the crossing he would have a plain view of the railroad track from the crossing northward to the Derling curve. The view of a person in a wagon would be clearer and better, as he would be higher, and that would give him a better view. I examined the crossing today.

Cross-examination:

I went down there for the purpose of determining whether there were any trees or bushes that would obstruct the view. I went today and a week ago also. I have not assisted Mr. Penn in working up this case, except that I introduced him to four or five men. There are some bushes and trees along the right of way north of the crossing. There are a few of them, but they are not thick enough to obstruct the view. I suppose they are willows. They are off the right of way. There is a sycamore tree on the other side of the creek. There are some large trees on the creek, but they do not keep me from seeing. Transportation has been furnished me by the company to attend this trial.

Testimony of T. A. Murphy.

T. A. MURPHY, being sworn, testified as follows: I live at Denison and am conductor on the M., K. & T. road. I was conductor in charge of the train which collided with the wagon on the 28th of January last. As the train approached the depot, I was attending to my passengers, preparing to disembark them at Smithville.
156 My attention being occupied with them, I did not notice whether the usual signals were given in approaching the depot or not, nor could I tell at what speed the train was running. We made the usual stop at the depot, and there was not any sudden lunge or stop that disarranged the seats or anything of that sort. We made the usual and customary stop. It is difficult to estimate with any degree of exactness the speed of a train. I don't think anybody can tell the speed of a train unless they are putting their whole attention to it, and then they must be experts. Even when you take your watch in hand and undertake to count the rails, it is pretty had to estimate it with any degree of exactness. I did not see the accident, but when I got to the depot Conductor Wm. M. Johnson told me we had struck a wagon down there. I unloaded my passengers and walked down there and tried to get a statement of the accident. Being in charge of the train, it was my duty to do so and impart the information to the company. When I reached the scene of the accident I saw three men lying on the ground, the wagon turned over, and the horses killed. They were lying on the

east side of the track, next to town. I saw a bottle of liquor lying by the side of Jim Ferris, who was killed. I was trying to find out what his name was to put it in my report, and there was a little boy standing there who said it was his daddy, and gave me his name as Jim Ferris. I could not say what was in the bottle. It seemed to be about half full and the liquid had a kind of pink color. The little boy said that it was his father and made the following statement to me at the time: "Uncle Cass is the cause of my father being killed. He whipped them horses right into the train."

Cross-examination:

He said nothing about the horses stopping in the track. I don't know how old the boy was; I should judge about eleven years. He was the lesser of the two. There was another boy along who looked to be about fourteen years old. The boy who spoke to me was about two feet from his father. The statement mentioned above was not made in answer to a question from me. I just said, "Who is this man?" and the little fellow said, "That is my dad," and made the statement as I gave it. He said, "Uncle Cass is the cause of
157 my father being killed. He whipped the horses right into the train." I took the statement down and made my report to the company. I reported all that I could get hold of. There was a man there who said, "Take the boy away." The man looked like the attorney, Mr. J. P. Fowler, who is sitting near you. I asked no further questions. I did not send for a doctor; some one else had already done so. I made the remark that some one should go for a doctor. One of the men still showed signs of life. He was taken up and carried away. I have been a conductor on a passenger train 13 or 14 years. I first started on the M., K. & T. road, in 1877, as a freight brakeman, and have been in the passenger service on that road about fifteen years. My run is from Denison to Taylor. I am familiar with the track from Hillsboro to Smithville. The engineer is responsible for the time of the train. If the engineer is not making time enough I would tell him to make better time, and if I thought he was going recklessly fast, it is my duty to notify him. In order to have an idea at what speed a train is going, I have to sit down and see by counting the rails or otherwise. I don't believe that any man can just sit there and, without timing, tell how fast a train is going. I do not believe we were making faster time than usual when approaching Smithville. We were somewhat behind time. I have no idea at what distance a train can be stopped, going at a given rate of speed. I cannot give an opinion as to the rate of speed the train was running when it passed the crossing and the men were struck.

Testimony of John Pepple.

JOHN PEPPLE, being sworn, testified: I am an engineer and have followed that occupation for 15 or 16 years. I was the engineer on the train that collided with the wagon at the crossing north of the depot at Smithville on January 28th. I blowed the whistle for the

station as we approached the depot. I gave the signals for the crossing by whistling two long and two short blasts. The bell was ringing as we approached the crossing. It began to ring about a quarter of a mile north of the crossing where the accident occurred
158 and continued the ring until we got down to the depot. I gave two long and two short blasts for the crossing. I did not see the wagon before we struck it. I was sitting on the right side of my engine, which is the proper place for the engineer. An engineer sitting at that place could not have seen a party of the crossing that is to the east of the rail at any point from the bridge down to the crossing. I could not see a team on the crossing after we got to the south end of the bridge. Being at the tank, I could not see a wagon approaching the crossing from the town site before it got on the track. The track curves to the left there, and I would be looking from the right-hand side of the cab. Besides that the signal lamp, headlight, smokestack, bell post, sand box, dome, and cab all obscure the view of the engineer, who is on the right-hand side, they shutting off the view towards the left. At the time we approached the crossing we were running, I should judge, about 12 miles an hour—not over that. I did not see the wagon and team before the engine struck them.

Cross-examination:

I have been running a train about 16 years, and six or seven years on this particular piece of road. I am perfectly familiar with the piece of road lying between the curve and the crossing, about one-third of a mile. We had emergency stops on the train. I understand the use of air fairly well, and the working of the brake appliances. I don't know how fast we were running after leaving Upton. We were behind time. After leaving Upton we were running 35 or 40 miles an hour. When we rounded the Kite crossing we were making about 25 miles an hour. We first applied the brakes about 300 yards north of the Kite crossing. The first application of air was made right after whistling for that crossing. I shut the steam off, and the further she rolled the less speed she got. At the first application of air we were going at 25 miles an hour. When a second application of air was made it was about 15. That speed went down till it was about 12. The train had 6 cars and had air appliances. If the emergency had been applied as we rounded the curve going at the rate of 25 miles an hour,
159 I expect the train would have gone fully half way from the curve to the bridge before stopping. I should think that it is about a quarter of a mile from the curve to the bridge. At that rate of speed it would take about 300 yards to stop. When we got to the bridge we were running 15 miles an hour and from there on 12. Running at the rate of 12 miles an hour with the brakes already applied, I should judge that on that piece of road by applying the emergency you could stop a train at about 35 or 40 yards. If I had seen the wagon and team coming, I would never have struck them, of course. What I have said with regard to the ob-

struction of the view of the engineer to the left of the track does not apply to the view of the fireman. When the view of the engineer is shut off that of the fireman is opened up. It is further than 35 or 40 yards from the south end of the bridge to the crossing. If the fireman had called my attention to these men at the south end of the bridge, I could easily have stopped the train before reaching the crossing. The fireman was sitting on the seat box. He hollered at me right down at the crossing. He said something to me at the end of the bridge, and I put on the air and the emergency. I think I did. I know I applied the air. I don't know whether it was the emergency. When the sleeper went across the crossing, it was only going about four miles an hour. As soon as the engine passed the crossing I left off the air. The fireman looked around and said something about a horse. He kept looking out, and I looked out the side window. I should judge that we were going about four miles an hour. I did not see the men before the collision. I knew that I struck something, having heard the crash and the noise and seeing the fireman look around. I applied the emergency before that somewhere between the bridge and the tank, as near as I can recollect. I did not state to a number of parties on the day of the accident that the first that I knew about it was that I saw something fly up over the smokestack. I applied the emergency between the tank and the bridge. I heard the fireman say, "Whop, whop, a horse!" and I applied it. We were behind time and were running the train going to Smithwille at as good speed as we could consistently with the *with the* 160 safety of the train and the public. I could have made better speed, but it would not have been proper; 17 or 18 miles an hour would not have been the proper speed, nor would 20 to 25. It was the duty of the fireman, if he observed any person in peril on the track, to call my attention to it, and it was my duty to act according to my judgment. The engine had an automatic bell-ringer. It had been out of order all day and would not work, so the fireman rang the bell with his hand. I whistled for the station. I only made one whistle after that, and that was the crossing whistle. I crossed two public roads. I whistled for both of them. I whistled for the other road before I made the station whistle. I am sure of that. I always do. I ran the train over that piece of road the day before. I don't know whether I whistled for the crossing then, and also ran over it the day after. I could not swear that I whistled for the crossing that day. We whistled for the crossing on the day of the accident. We were coming in a little faster than usual, being late, and we were particular about that crossing.

(Here defendant closed.)

Testimony of Rodger Byrne.

Rodger Byrne, being sworn, testified in rebuttal as follows: I live in Smithville; am an alderman there and own a saloon. I knew old man Ashley, the deceased, but did not know the Ferris boys. On the day of the accident I saw persons in Smithville who

I afterwards learned were the Ferris boys. I saw these three parties about half an hour before the accident. They walked out of my saloon. One of them stayed with the team in front of the house, and one of them, with old man Ashley, walked out and got into the wagon and went down Front street. Jim Ferris bought half a pint of alcohol and colored it with blackberry wine and water. He did not drink any of it there that I know of. He took it and went to the wagon. He and Ashley got into the wagon, and they went off down Front street. I have been in the saloon business about 15 years. I think I could tell fairly well if a man is under the influence of liquor.

161 I considered that old man Ashley had as much liquor as he could carry and get along with. The Ferris boys talked considerably in there. I would not consider them drunk. I do not think they were under the influence of liquor to such an extent that it would make them inconsiderate of their safety or render them incapable of taking care of themselves. They were not staggering and were not boisterous. They walked backwards and forwards and talked. They were lively and had lots of fun in them. I went to the crossing after they had been struck by the train and looked at them. This was 20 or 25 minutes after they were struck. I saw, I suppose, the same bottle of liquor which they bought at my saloon. One of the Ferris- was sitting on something. They put him in a delivery wagon and carried him off. He was bleeding pretty freely. Old man Ashley was lying on the ground on one side of the crossing and Ferris was on the other. I saw the bottle of liquor. There was no stopper in it. It was about one-third or one-half full. Some of it had run out on the ground. I was invited to ride on a locomotive with S. H. Spangler and Pike Baker for the purpose of observing the view that could be had. We got on in front of the depot and they backed on out past the bridge, considerably to the north of it. Mr. Spangler sat in the engineer's seat. We went up to the mouth of the cut. There, in the neighborhood of the curve, we made an observation. Mr. Spangler sat in the engineer's seat. I stood right back of him, and we could see the crossing easy and, in fact, to the right of it as far as the right of way. We came on south very slowly. When we got on and crossed the bridge we could not see all the crossing to the left, and — we got closer it would cut off the view gradually. I was standing up, and if the engineer was sitting down I could see a little farther ahead than he could. I could look between the sand box and the smokestack and could see any object along the dump until we got up to the crossing, but if the engineer was sitting down I don't suppose he could. If he was standing up, whether he could get the same view that I did would depend upon his height. Mr. Spangler was sitting down on the seat occupied by the engineer, and, his head being up to my breast, I had a better view than he.

Cross-examination:

162 By standing up and looking between the sand box and the dome I could see to the left of the track at the crossing, but in order to do that I had to lean out of the cab. Mr. Spangler, who

was occupying the engineer's seat, was sitting down and I was back of him, and in order to see between the sand box and the smoke-stack I would have to lean over. In order for an engineer to do this he would have to get away from his seat and from his brakes and other appliances. I am satisfied that Mr. Spangler could not see what I could see. I saw one of Ferris boys drinking at my saloon. He drank beer. I don't think he drank more than three times. This was after half past twelve or one o'clock that day. I cannot tell what effect beer, whiskey, and as much alcohol and blackberry wine as I sold for 25 cents a bottle would likely have on the human system. Alcohol is very strong. It is about twice as strong as whiskey. I sold them blackberry wine, too. I never heard of egg-nogg being made out of alcohol and blackberry wine. I don't know whether these parties left town after they left my place or not. Ashley was drunk. He had as much as he could carry; as much as he could walk along with. He was pretty well organized. The Ferris boys drank only beer at my place. If they drank anything else, I did not know it. It was from 20 to 35 minutes from the time they left until I went down to the crossing. There was a big crowd there and a great many had left. My saloon is about 500 yards south of the crossing. I can step out into the middle of the street in front of my saloon and see a train on Gazley's creek, which is a good long ways north of the crossing—say 150 yards. You can see the track beyond the bridge for some distance. I never measured it, but I think from 100 to 150 feet beyond.

Testimony of T. B. Adkins.

T. B. ADKINS, in rebuttal, testified in behalf of plaintiffs as follows:

I know Cass Ferris; he was brought to my house after the accident. He was in bed there five weeks. I was with him the day after he was struck. I was with him during the day succeeding the injury. He was injured on the head and elbow. I did not
163 see the wound on his head before it was dressed. The wound on his head started in here on the forehead came around about to here and over his left ear. The scalp was knocked clean off and turned back when I saw it. A part of the skull was exposed. He suffered pain on that day; he was not at himself during that day; he did not have anything to say. If you asked him anything, he would answer; he could not do any talking without you asking him. I remember Mr. Sheffield seeing him on that day. I was there about the house, but I don't remember whether I was in the house all the time or not. I was there part of the time. I did not hear Cass Ferris tell him that he was so drunk he did not know what hurt him. I did not hear him tell anybody that. I did not hear him make that statement during the five weeks he was at my house. It was about a week and a half or two weeks before he realised where he was at.

Cross-examination:

Cass Ferris is my uncle. On the day mentioned he would answer any question that was asked him. I don't remember whether I was in the room all the time Mr. Sheffield was there or not. I was about the house, but I would not undertake to say that I was there all the time.

It is agreed that the above and foregoing statement of facts in the case of Mollie F. Ferris *et al vs.* The Missouri, Kansas and Texas Railway Company of Texas, No. 1884, pending in the district court of Bastrop county, Texas, constitute a true and correct statement of the facts and all the facts proven thereat.

S. L. STAPLES AND
JOHN W. PARKER,
Attorneys for Plaintiffs.
ORGAIN & GARWOOD,
Attorneys for Defendant.

The attorneys for the parties, plaintiff and defendant, having agreed upon the above and foregoing as a true and correct statement of all the facts adduced in evidence upon the trial of said cause, I, Ed. R. Sinks, judge of the 21st judicial district, having examined same and found it in all things correct, do hereby approve the same and order it filed as a part of the record in this case.

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ED. R. SINKS,
Judge 21st Judicial District.

Filed July 25th, 1899.
R. J. GRIESENBECK, *Clerk.*

Motion for a New Trial.

Filed June 26th, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, A. D. 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y COMPANY OF TEXAS. } No. 1884.

Herein comes The Missouri, Kansas and Texas Railway Company of Texas, defendant, and moves the court that the verdict and judgment rendered herein on the 24th day of June, 1899, against it be set aside and a new trial granted it for reasons following:

1. Said verdict and judgment are contrary to and not supported by the evidence in this: The evidence shows that the death of the said James Ferris was caused by his own contributory negligence, in that he approached the railroad crossing where the accident occurred, with which he was thoroughly familiar and at a time when he knew the train which struck him was due, in a state of intoxication, and that although said crossing was so situated that for at least

four hundred yards a person approaching the same along the route pursued by said James Ferris could see at every point along said route a train approaching said crossing from the north for at least a distance of six hundred yards, and although the view of the said James Ferris of said approaching train was absolutely clear and unobstructed from the time said train was six hundred yards distant until it reached said crossing, which plain, clear, and unobstructed view said James Ferris had at every moment during the time he was traversing the four hundred yards before reaching said crossing and at the time he entered upon the same, that nevertheless he wholly failed to use either his senses of sight or hearing and wholly failed to stop or to look or to listen before entering upon said crossing to ascertain whether any train was ap-
165 proaching, but recklessly and negligently, while under the influence of intoxicating liquors, attempted to cross said track in front of an approaching train, which he either saw or by the use of the slightest care could have seen approaching said crossing, and that at the time and place of the accident he wholly failed to use such ordinary care as would govern the action of an ordinarily prudent man under the same circumstances, which negligence directly and proximately contributed to his injury.

2. Said verdict and judgment are contrary to and not supported by the evidence in this: Said evidence shows that the injury complained of was caused by the negligence of Cass Ferris and William Ashley, jointly and severally, which said negligence was imputable to the said James Ferris in this, that at the time and place of the accident the said William Ashley and Cass Ferris were each under the influence of intoxicating liquor to such an extent that they were wholly unable to prudently control said team and drive said wagon or to prudently approach said crossing, all of which James Ferris knew before taking passage with them in said wagon; that said Cass Ferris and Wm. Ashley were each familiar with said crossing and knew that the train causing the collision was due at or about the time of the collision; that said Cass Ferris, notwithstanding his intoxication, was attempting to drive said wagon, and said William Ashley, notwithstanding his intoxication, was attempting to participate therein, all of which deceased well knew at the time he took passage in said wagon and before and at the time he undertook to pass said crossing; that the said Cass Ferris and William Ashley, to whose care deceased had thus voluntarily committed himself, wholly failed to stop or to look or to listen for an approaching train or to use either their senses of sight or hearing for that purpose, notwithstanding there was no obstruction of any kind to cut off the view of such train for at least six hundred yards to the north of said crossing as they entered upon the right of way and upon the approach to said crossing and for several hundred yards on their route thither, and they, the said Cass Ferris and William Ashley, jointly and severally, failed to act with ordi-
166 nary care and prudence in undertaking to pass said crossing without stopping or looking or listening for said train, or if they did see the same in undertaking to pass over and cross in ad-

vance thereof, which negligence proximately contributed to the injury herein complained of, and which by reason of the fact that the said deceased was engaged in the joint and common enterprise with said Cass Ferris and William Ashley, and by reason of the fact that the deceased had committed himself to their control and carriage, well knowing their incapable and intoxicated condition, was imputable to the deceased, James Ferris.

3. Said verdict is contrary to and not supported by the evidence in this, that the evidence conclusively shows that at the time and place of the injury the deceased was intoxicated and incapable of exercising ordinary care and prudence, and that the injury was the direct and proximate result thereof.

4. The verdict and judgment is contrary to and not supported by the evidence in this, that the overwhelming preponderance of the testimony shows that the servants and agents of the defendant railroad company were guilty of no act of negligence herein; that the whistle was blown and the bell rung as said train approached the crossing as demanded by statute; that proper lookouts were kept and proper warnings of the approach of said train given, and that said accident was caused *b*ot by the negligence of this defendant, its servants or agents, but by the inexcusable negligence of the deceased and his associates.

5. The verdict and judgment herein are contrary to and not supported by the evidence in this, that the amount of damages adjudged by the jury against this defendant, to wit, the sum of ten thousand dollars, is grossly excessive and extraordinary in this, that the proof showed that the value of the labor of deceased was not more than five or six hundred dollars per year; that he was a renter, renting from thirty to forty acres of ground per year; that the total value of his labor was not more than seven hundred dollars per year, and that out of this was deducted the rents due his landlord and other expenses, making the sum of not more than five
167 hundred dollars per year the highest possible estimate of the value of his labor per year, and that even this estimate, it is believed, is of necessity higher than can be justified under the evidence herein.

6. The evidence shows herein that Mrs. Mattie Lee is a married woman and without pecuniary interest in the life of her father, and that said verdict is excessive to the amount adjudged in her favor therein.

6*a*. The evidence herein shows that Mrs. Mattie Lee, who sues alone, is a married woman and not entitled to recover, there being no allegation in the pleadings that she has been abandoned by the husband or that he refuses to join in this suit.

7. The court erred in permitting the witness T. C. Wilson to testify, over the objection of defendant, that the crossing in question had been used by the general public ever since witness had been in Smithville, about three years; that it was used considerably, and that it was so used on the 28th of January, this year; to which defendant objected on the ground that there was no allegation in plaintiff's pleadings to justify the same, the only allegation being that the

crossing was a public road and street, as will more fully appear from bill of exceptions No. one.

8. The court erred in refusing to take as confessed the interrogatories propounded to Sam. and Frank Ferris under the provisions of chapter 3, title 40, of the Revised Civil Statutes relating to *ex parte* interrogatories, and in refusing to sustain the motion of defendant that the said Sam. Ferris should not be permitted to testify concerning the matters covered by such interrogatories for the reason that the statute of 1897, forbidding the taking of *ex parte* interrogatories where a corporation is a party, is contrary to and in conflict with the 14th amendment of the — United States in this, that it deprives defendant corporation of the equal protection of the laws, as will more fully appear from defendant's bill of exception No. 2.

9. The court erred in failing and refusing to give charge No.
168 one asked by defendant, which is as follows: "If an engineer in charge of a locomotive drawing a passenger train — approaching or waiting to cross the railroad he is not bound to anticipate that they will attempt to cross in front of the train, and therefore he is not required to check his speed so much as would be necessary to enable them to cross in front of such locomotive."

10. The court erred in refusing to give charge No. 2 asked by defendant, as follows: "You are charged that one in approaching a railroad crossing cannot relieve himself of the care which he must exercise as an ordinarily prudent man upon the presumption that the railway company is going to perform its duty, and thereby justify him in going upon the crossing without the exercise of proper care upon his part, and defendant's failure to ring the bell or blow the whistle, or the fact that its train may have been running at a rate of speed which you may consider improper, should you so believe, does not relieve such person of the care which he must exercise as a man of ordinary care and prudence to ascertain if the train is approaching and if it would be dangerous to attempt to make the crossing."

11. The court erred in refusing to give charge No. 3 asked by defendant, as follows: "It is the duty of *the* approaching a railroad crossing to exercise the care and prudence that a man of ordinary care would exercise under the same circumstances, and if you should believe that in the exercise of such care it was the duty of James Ferris to have stopped before driving upon said railway, and that he failed to do so, or if you should find that in the exercise of such care it was his duty to look and listen for the approach of the train, and that he failed to do so, and you should find that under all the circumstances he was negligent, and that such negligence contributed to the injury herein complained of, you will in that event return a verdict in favor of the defendant."

12. The court erred in paragraph 5 of its charge to the jury in failing to charge that if the jury believed that under all the circumstances of the case an ordinarily prudent man would have
169 stopped before approaching said crossing, and that deceased did so fail, and that such failure contributed to the injury

complained of, they should find for the defendant, the court thereby eliminating the failure of deceased to stop, if he did so fail, from the case, as proof of negligence.

13. The court erred in paragraph 6 of its charge to the jury, wherein he instructed the jury as to what negligence of Cass Ferris and William Ashley would be imputable to deceased Ferris, in this, that in said paragraph he eliminated from the consideration of the jury the failure of said parties or either of them to stop as an element of negligence herein, the proof tending to show that they did fail to stop, and that under the circumstances of this case such failure was negligence.

14. The court erred in failing and refusing to give charge No. 4 requested by defendant, as follows: "The fact that the attention of deceased, James Ferris, may have been diverted by the switch-engine near by or by the misbehavior of the team, and that his attention being drawn thereto he was rendered inattentive to his real danger, does not relieve said James Ferris from the necessity of looking and listening for approaching trains, and although you should believe that his attention was so diverted, yet if you further believe that he failed to look or listen for an approaching train, and that under all the circumstances he failed to act with the care that a reasonably prudent man would under the circumstances, and that such negligence contributed to his injury, you will find for the defendant."

15. The court erred in refusing to give charge No. 5 asked by defendant: "Although you should believe from the evidence that the crossing along and over which the deceased, James Ferris, was endeavoring to pass may have been constructed in an improper manner, or that it was not wide enough to permit a team to be turned around after starting on the approach thereto, yet if you should believe that the deceased, James Ferris, was acquainted with such crossing and familiar therewith, then it was the duty of the
170 deceased to have more carefully looked and listened for trains before going upon said approach; and if you believe from the evidence that deceased's view was unobstructed and he saw or could have seen the train approaching before going on the approach to said crossing by looking, it was his duty to do so, and if he failed to look or if he did look and saw the train approaching he cannot be heard to complain of the narrowness of said approach, and if under all the circumstances you believe that he failed to use ordinary care and diligence to ascertain the approach of said train or in attempting to cross before it if he did discover it, and under all the circumstances he was negligent, then you are instructed that the deceased could not urge the narrowness of such crossing or other defect, if any, as an excuse for his own negligence, and you will find a verdict for the defendant."

16. The court erred in its charge to the jury in wholly failing and refusing to attempt to apply the law of contributory negligence to the facts of this particular case, and failing and refusing to affirmatively present to the jury defendant's defence of contributory negligence, and in failing and refusing to give charge No. 6 requested by

defendant for the purpose of obviating said defect, as follows: "The defendant railway company in this case, in addition to the general denial, by which it denies that it has been guilty of any negligence in any of the particulars charged by plaintiffs, or that such negligence, if any, was the cause of the injury complained of, pleads that the deceased, James Ferris, was himself negligent, and that his said negligence contributed directly and proximately to his injuries. This is what is known in law as the defense of contributory negligence, under which you are instructed that even though you should believe that on the occasion herein inquired about the servants and agents of defendant company were negligent, and that such negligence contributed to the injury to James Ferris, yet if you further believe that the said James Ferris was also negligent, and that his negligence contributed to and co-operated with the negligence of defendant's servants in producing the injury, in that event the
171 plaintiffs cannot recover; in other words, if both parties are negligent and the negligence of each proximately contributes to the injury, there can be no recovery; hence in this case, although you might believe that at the time of the collision the agents of defendant were propelling the train at a rate of speed greater than a prudent man would have done under all the circumstances, or that they failed to ring the bell or blow the whistle, as required by statute, or failed to use ordinary care in any of the particulars set out in the charge heretofore given you, or that agents were guilty of all of said acts and omissions, and that under all the facts and circumstances of the case they were negligent, and that such negligence directly contributed to the injury of the said James Ferris, yet if you should further believe that the said James Ferris was familiar with the crossing and its approaches; that he knew that this particular train was due at said crossing at or about the time it did reach there; that at the time he was so far under the influence of intoxicating liquor as to be incapable of prudent action; that at the time they approached said crossing Cass Ferris and William Ashley were under the influence of liquor to such an extent as to render them unable to prudently drive and direct a team and wagon, and that deceased, James Ferris, knew this at the time he embarked in said wagon; that said wagon was open and without covers; that deceased had a clear, plain, and unobstructed view of defendant's track at said crossing and for a long distance to the north thereof and to the south thereof for a long distance before he reached said crossing and on the approach thereto and at said crossing, and that there was nothing to obstruct his view of an approaching train, and that by the use of ordinary care he could have seen or heard said train approaching from the north; that he did not look or listen to ascertain whether a train was approaching, or that, if he did see such train approaching the crossing, he endeavored to cross in advance thereof, and that if you believe under all the facts in evidence taken together that the deceased, James Ferris, in attempting to pass over said crossing in
advance of the approaching train failed to act with ordinary
172 and reasonable care and prudence of an ordinarily prudent and careful man under the same circumstances, and that such

failure to act with ordinary care proximately contributed to the injuries of said James Ferris, then, in that event, you will find a verdict in favor of the defendant."

17. The court erred in failing to give charge No. 7 asked by the defendant, as follows: "If you believe from the evidence that the deceased, James Ferris, saw the engine approaching and nevertheless undertook, in wagon drawn by a team of two horses, to cross in full view of such train, which was then and there in dangerous proximity to such crossing, and that such conduct would constitute negligence on the part of deceased, you will find for the defendant, provided that such negligence contributed to the injury of deceased."

18. The court erred in failing and refusing to give charge No. 8 asked by defendant, as follows: "It was the duty of defendant's employees operating the engine which came in contact with the wagon in which deceased, James Ferris, was riding to give signal of its approach by ringing the bell and blowing the whistle at the distance of at least 80 rods from the crossing where the collision occurred. The object of these requirements is to protect travellers on the highway approaching the crossing, and it is not required that these signals should be given at exactly 80 rods; and if you believe in this case that the whistle of defendant's engine was sounded at a point more than 80 rods distant from the crossing, but at such distance beyond that it could well have been heard at such crossing by a man of ordinarily good hearing, this would be a compliance with the law with regard to the blowing of such whistle."

19. The court erred in refusing to give charge No. 9 asked by defendant, as follows: "If you believe from the evidence that James Ferris and his companions or either of them saw the approaching train and stopped to permit it to pass by, and that thereafter Cass Ferris or William Ashley, without fault on the part of James Ferris, after seeing such train approaching and without ordinary care, urged the horses on the track in front of the train,
173 and that under all the circumstances the parties so urging said horses on the track were negligent, and that such negligence contributed to the injury, and if you believe that the parties so urging said horses on the track in advance of the approaching train did so because he was under the influence of intoxicating liquor, and was then and there incapable of directing and controlling the team and wagon as a man of ordinary care and prudence should, and that the said James Ferris knew such fact before taking passage on such wagon and voluntarily approached said crossing in charge of one in such condition, then, in that event, the negligence of said Cass Ferris or William Ashley would be imputable to the said James Ferris, and you will find a verdict in favor of the defendant, even though you should believe that defendant's agents were negligent also."

20. The court erred in failing to give charge No. 10 asked by the defendant, as follows: "If the defendant's employees in charge of its engine saw the wagon in which deceased was riding stop before reaching the railway, and if it reasonably appeared to them, acting with such reasonable care as would govern a man of ordinary prudence

under like circumstances, that such wagon would make no attempt to cross such railway until after such train passed the crossing, then you are instructed that it would not be negligence for such employees not to stop such engine."

21. The court erred in refusing to give charge No. 11 asked by defendant, as follows: "Although you should believe that the deceased, James Ferris, was at the time and place of the accident chargeable with no individual negligence, yet if you believe that at the time he, the said James Ferris, was engaged jointly with Cass Ferris and W. D. Ashley in driving said wagon, the same being then and there a joint and common enterprise, and the said James Ferris participating in the direction, government, and control of the wagon and team, and that said Cass Ferris and W. D. Ashley or either of them was so far intoxicated or under the influence of liquor as to render it unsafe for them or either of them to undertake to pass
174 such crossing, and that such fact was known to deceased, James Ferris, at the time he embarked in said wagon, and that at the time and place of the accident the said Cass Ferris and W. D. Ashley or either of them failed to act with ordinary care and prudence, which failure to act with ordinary care and prudence contributed to the injury of said James Ferris, then, in that event, the negligence, if any, of said Cass Ferris and W. D. Ashley or either of them would be imputable to the said James Ferris, and plaintiffs cannot recover, even though you should believe that defendant's servants and agents were negligent, and that such negligence contributed to the injury complained of, and in such event you will find a verdict in favor of the defendant."

22. The court erred in failing to give charge No. 12 asked by defendants as follows: "If you believe that at the time and place of the accident the said James Ferris was so far under the influence of intoxicating liquor as to be unable to exercise ordinary care in passing such crossing, and that at such time he did fail to use such ordinary care, and such failure to use ordinary care contributed proximately to his injury, you will in that event find for the defendant, even though you should believe that its servants were at the time and place negligent, and that such negligence contributed to the injury of said James Ferris."

23. The court erred in failing to give charge No. 13 asked by defendant, as follows: "If you believe that Cass Ferris and W. D. Ashley or either of them in approaching said crossing failed to act with ordinary care and prudence, and that under all the circumstances they or either of them failed to act with that care and prudence which a man of ordinary care and prudence would use under the circumstances, and that such failure was the sole cause of the accident, you will find in favor of the defendant."

23*a*. The court erred in failing to give charge No. 14 asked by defendant, as follows: "If you believe from the evidence that Cass Ferris and W. D. Ashley or either of them were drunk or so under the influence of intoxicating liquor as to render him or them an un-

safe driver, and that the deceased, James Ferris, knew this,
175 or by the exercise of ordinary care could have known it, and that by reason of such intoxication such person failed to use reasonable care, whereby the injury occurred, then the negligence, if any, of such person would be imputable to James Ferris, and you will find for the defendant, even though you might believe that its servants and agents had also been negligent."

24. The court erred in failing to give charge No. 15 asked by the defendant, as follows: "A railroad track is of itself a warning of danger to those who go upon it, and persons about to cross a railroad track are bound to recognize the danger and to make use to their senses of sight and hearing to ascertain, before attempting to cross it, whether a train is in dangerous proximity, and if they neglect to do this, but venture blindly or carelessly upon the track, without any effort to ascertain whether a train is approaching, it must be at their own risk."

25. The court erred in failing to give charge No. 16 requested by defendant, as follows: "If you believe that James Ferris, the deceased, was engaged, together with Cass Ferris and W. D. Ashley, in the common and joint enterprise of driving an open wagon, in which common and joint enterprise the deceased was cooperating with and assisting the said Cass Ferris and W. D. Ashley, and that the said Cass Ferris or W. D. Ashley was under the influence of liquor and failed to stop or look or listen for an approaching train as they approached said crossing, and that they, the said Cass Ferris and W. D. Ashley, failed to use ordinary care to ascertain the approach of a train — by the use of their senses of sight and hearing they could have ascertained the same, and that under all the circumstances of the case they or either — were negligent, and that such negligence contributed directly to the injury of James Ferris, then you are instructed that under the law the negligence of such party is the negligence of James Ferris, and there can be no recovery herein, even though you should believe that the servants and agents of defendant were negligent, and that such negligence contributed directly to the injury, and if you should so believe you will find for
176 the defendant."

26. The court erred in failing to give charge No. 17 asked by defendant, as follows: "It is not the duty of those in charge of a railway engine to keep a lookout for parties approaching the crossing. It is their duty in approaching a railway crossing to blow the whistle and ring the bell, as charged, and to use reasonable care, and if any person, notwithstanding such signals and care, is discovered on the track at the crossing, to use reasonable care to avoid injuring them after such discovery; but it is not the duty of persons in charge of the engine to keep a lookout for those approaching the crossing, and a failure to do so does not constitute negligence."

27. The court erred in failing to give charge No. 18 asked by defendant, as follows: "Failure to ring the bell or blow the whistle, or the failure of the railway company to use the proper care and diligence in approaching the crossing, would not excuse the de-

ceased, James Ferris, from the exercise of proper care. The duties of each in this respect are reciprocal, and although the railway company may have failed to perform its duty in the premises, still if the deceased by the exercise of reasonable care *he* could have avoided the accident, he would be guilty of contributory negligence, and should you so believe you will find for the defendant."

28. The court erred in failing to give charge No. 19 asked by defendant, as follows: "It was the duty of the servants and agents of defendant in charge of running a train upon its tracks in approaching a crossing upon its track to ring the bell or blow the whistle to indicate the approach of the train. The use of these signals is prescribed for the safety of those in the neighborhood of approaching trains, but the failure to perform the duty of ringing the bell or blowing the whistle would not relieve the person in danger from the duty of using his senses to ascertain the presence of an approaching train, and if such person was aware of the presence of the train, the failure of the servants and agents of the defendant to ring the bell and blow the whistle would be immaterial."

29. The court erred in failing to give charge No. 20 asked
177 by defendant, as follows: "If the evidence shows that the deceased, James Ferris, was off the railroad track and out of reach of the train when the place where he was came within the view of those in charge of the train, and went upon the track after the train approached so near him that the same could not be stopped by defendant's servants by the use of ordinary care and prudence, using all the means usual for stopping such trains, in time to avoid the danger, and that all such means were used at the time, then plaintiffs cannot recover, and you will return a verdict in favor of the defendant."

30. The court erred in failing to give charge No. 21 asked by the defendant, as follows: "An inevitable accident is one that cannot be anticipated and provided against by human foresight. For such an accident there is no legal liability. If you believe that the accident herein complained of was an inevitable accident, you will find a verdict in favor of the defendant."

31. The court erred in failing to give charge No. 22 asked by defendant, as follows: "If from the evidence you should believe that the appearance of the said James Ferris upon the track was so sudden and unexpected that it left no time to stop the train and avoid the injury, then plaintiffs cannot recover, and you will find a verdict in favor of the defendant."

32. The court erred in failing to give charge No. 23 asked by defendant, as follows: "The running by defendant of trains upon its track was authorized by law, and the law did not impose any rule as to the rate of speed of such train. The defendant was entitled to its track for its trains to run upon, and its servants and agents in charge of a running train had the right to act upon the presumption that the right of way for trains would be respected by persons approaching the track. This, however, would not excuse the negligent running upon and over a person upon the track. It was the duty of the servants and agents of defendant in charge of a running

train on the tracks at all times, and especially in passing through towns and in approaching crossings where people were accustomed to pass, to keep a lookout for persons on its tracks, and if a person was seen upon its tracks and in danger, to check or halt the
178 train, if it could be done by the use of ordinary care and by the use of ordinary means, to avoid inflicting injury upon such person."

33. The court erred in refusing to give charge No. 24 asked by defendant, as follows: "You are instructed that while it is the duty of the servants and agents of a railway company to keep a lookout for obstructions upon its tracks and crossings and to use ordinary care to prevent collisions therewith, yet it is not their duty to keep a lookout to ascertain whether persons are approaching said crossings or not, and that if they see such persons they have the right to assume that they will not undertake to drive upon the track in front of an advancing train, and it is not the duty of those operating such train to slacken its speed or stop the train for the purpose of permitting such persons to pass over the track; hence, although you should believe in this case that the fireman, J. W. Slocum, saw deceased, James Ferris, and his companions approaching said crossing in a wagon, and that at said time they were at or upon the approach to said crossing, as testified to by him, then he had the right to assume that they would not undertake to go upon and over such crossing in advance of such approaching engine, and it was not the duty of such engineer and fireman to stop said train or slacken speed thereof on that account; and if you should believe that after said engine had approached so near the said crossing that the agents of the company were unable to stop the same, that deceased and his companions drove suddenly upon the track in advance of the engine and were struck, and that deceased under all the circumstances failed to use ordinary care, which failure to use ordinary care proximately contributed to his injury, you will return a verdict in favor of the defendant."

34. The court erred in failing to give charge No. 24*a* asked by defendant, as follows: "The defendant company in this case, in addition to the general denial, by which it denies that it has been guilty of any negligence in any of the particulars charged by plaintiffs, or that such negligence, if any, was the cause of the injury com-
179 plained of, pleads that the deceased, James Ferris, was himself negligent, and that those in the wagon with him were negligent in such manner as is imputable to him, and that such negligence contributed directly and proximately to his injury. This is what is known in law as contributory negligence, under which you are instructed that even though you should believe that on the occasion herein inquired about the servants and agents of the defendant were negligent, and that such negligence contributed to the injury of James Ferris, you will, if you further believe that James Ferris was also negligent, or that Cass Ferris or Willlam Ashley or either of them were negligent under such circumstances as that their negligence would be imputable to James Ferris under the charge

hereinbefore given you, and that such negligence contributed to and co-operated with the negligence of defendant's servants in producing the injury complained of, in that event plaintiffs should not recover. In other words, if both parties were negligent, and the negligence of each approximately contributes to the injury, there can be no recover-; hence in this case, although you might believe that defendant failed to ring the engine bell or blow the whistle, as required by statute, or failed to keep a proper lookout, or that they were propelling said train at a greater rate of speed than would have been used by men of ordinary care, or that they were negligent in any of the particulars of this charge hereinbefore given you, and that such negligence directly contributed to the injury of the said James Ferris, yet you are instructed that if you further believe that the said James Ferris was familiar with crossing at its approaches; that he knew that this particular train was due at said crossing at or about the time it did reach there; that at the time of the collision he was so far under the influence of intoxicating liquors as to be incapable of prudent action, and at the time they approached said crossing Cass Ferris and William Ashley were under the influence of liquor to such an extent as to render them unable to prudently drive, direct, and control a team on and over said crossing, and that deceased, Ferris, knew this at the time he embarked in the wagon, and that said wagon was open, without cover or coverings, and that each of the occupants thereof had
180 a clear and unobstructed view of the defendant's track at said crossing and for a long distance to the north thereof, as well as to the south, before reaching the said crossing and the approach thereto and at the same, and that there was nothing to obstruct his view of the approaching train, and that by the use of ordinary care he could have seen or heard said train approaching from the north, and that he did not look or listen to ascertain whether or not a train was approaching, or that if he did see such train he attempted to cross in advance thereof when it was at such distance from the crossing that a man of ordinary prudence would not have undertaken to make the crossing in front of it, and if you believe under all the facts in evidence, taken together, that the deceased, James Ferris, in attempting to cross over said crossing at the time and in the manner and under the circumstances developed in this evidence, failed to act with that ordinary and reasonable care and prudence which would characterize the action of an ordinarily careful and prudent man under the same circumstances, and that such failure to act with ordinary care proximately contributed to his injury, then, in that event, you will find a verdict in favor of the defendant."

35. The court erred in failing to give charge No. 25, asked by defendant, as follows: "The jury is instructed that a railroad track is in itself a warning of danger to those who go upon it, and those about to cross it are bound to recognize the danger and make use of their senses of hearing and sight, and if either cannot be made available, the obligation to use the other is the stronger, to ascertain, before attempting to make the crossing, whether or not a train is approaching, and if one neglects to do this, but carelessly or recklessly ventures upon

the track and is injured, it is at his own peril; and if you believe from the evidence that in approaching said crossing the view of a train approaching from the north was unobstructed and deceased saw or could have seen by looking such train as it approached, and if you believe that deceased, James Ferris, by the use of ordinary care could have seen such approaching train, and that
181 he did not use such care, or that he could have heard such train approaching by the use of ordinary care and failed to use such care, or if you should believe that he saw such train and nevertheless undertook to cross in front of the same, and that under all the circumstances he failed to act with that care which would govern an ordinarily prudent man under the same circumstances and was negligent, and that such negligence contributed to his injury, you will find for the defendant."

36. The court erred in failing to give charge No. 26 asked by defendant, as follows: "You are instructed that the law provides no particular rate of speed at which a railroad train shall approach a public crossing, and it is for you to determine, under all the facts and circumstances of this case, whether or not said train in approaching this crossing did so at an improper rate of speed, and whether or not, under all the circumstances of the case, the servants and agents of defendant failed to use ordinary care in propelling said train at the rate of speed used; but you are further instructed that even though you should believe from the evidence that said train was being propelled at such rate of speed as was improper and imprudent, that nevertheless this would not justify the plaintiff in failing to use due care and diligence in approaching said crossing, and you are further instructed that a person approaching the crossing has no right to presume that a train approaching the same is being propelled at any particular rate of speed, and if he sees a train approaching within such distance of a crossing that a man of ordinary care would not undertake to make such crossing, and that nevertheless he does so, and that under all the circumstances he failed to act as a man of ordinary prudence would under the same circumstances, and such failure contributed to his injury, you will, in that event, find for the defendant."

37. The court erred in failing to give charge No. 27 asked by defendant, as follows: "The law does not regulate the rate of speed at which trains shall be run in passing through towns and cities,
182 and if you believe that the servants and agents of the defendant in approaching the public crossing in this case gave proper warning of the approach of said train by ringing the bell and blowing the whistle, and that from the situation of said crossing a person of ordinary care and prudence in approaching the same in the manner used by the said James Ferris could have seen or heard the same in time to have avoided going upon said crossing, then you will find a verdict in favor of the defendant, even though you may believe that the said train was running at a high and unusual rate of speed."

38. The court erred in failing to give charge No. 28 asked by defendant, as follows: "You are instructed that the duties of the servants

and agents of the defendant railway company in charge of the train which collided with the wagon on the occasion under investigation did not require them to assume that the persons approaching the crossing would undertake — cross in advance of the approaching train, but they had the right to assume that such parties would stop before undertaking to make the crossing; hence if you believe that the fireman, J. W. Slocum, saw the wagon containing the deceased approaching the crossing, and that at such time they were stopped at or near the foot of the crossing, then he had the right to assume that they intended to permit the train to pass over the crossing before the deceased undertook to pass it; and if you believe that deceased and his companions whipped the horses upon the track immediately in front of the engine and in such close proximity thereto that defendant's servants and agents could not see the same, or, if they did see it, not in time to prevent the accident, you will find for the defendant."

39. The court erred in failing to give charge No. 29 asked by defendant, as follows: "Although you should believe from the evidence that the team of Cass Ferris became frightened, that it engaged the attention of the said Cass Ferris and the deceased, and if you should further believe that the same was caused by the switch-engine standing near the crossing and emitting steam, yet if you should further believe that deceased saw, or by the use of ordinary care could have seen, such switch-engine, and that they nevertheless undertook to pass in close proximity to such engine, and that thereby such animal- became scared and so drew their attention that they failed to notice or listen for an approaching train, and that by reason of such failure the injury occurred, then, in that event, the fact that the animals became frightened will not excuse them from exercising ordinary care to watch for and listen for an approaching train, and if they did so fail and such failure was the cause of the accident, you will find for the defendant."

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40. The court erred in refusing to permit the witness Mollie Ferris, the witness in this case, to testify that on the day succeeding the death of her husband, and before his body had reached home, she made and entered into a written contract with an attorney for the bringing of this suit, as per bill of exception No. 3, said testimony being material for the reason that said plaintiff seeks damages herein for the loss of the society and comfort of her deceased husband, and the fact that she would enter into such a contract at a time when the ordinary dictates of the human heart would suggest profound grief and uncontrollable emotion, tends strongly to show that said plaintiff is made of such stuff as that she would not suffer materially from the loss of the society of her husband and the comfort incident to the marital relation, and that she valued him dead rather than living.

41. The court erred in paragraph 5 of its charge to the jury, which is as follows: "If, however, you believe from a preponderance of the evidence that the said James Ferris, in approaching the said crossing in the wagon, failed to look and listen for an approaching train, and if you believe that a man of ordinary care would have

looked and listened under the circumstances, for a train before entering upon said crossing and railway, and that his failure to look and listen directly and proximately contributed to the striking of the wagon and his death, you will find a verdict for the defendant, and this, too, though you may believe the defendant did not use ordinary care in running its train up to and over said crossing."

184 said charge of the court being erroneous, in this, that it distinctly instructs the jury that before they can find that James Ferris was negligent, they must believe from a preponderance of the evidence that he must both fail to look and listen, whereas the law is that if he either failed to look or failed to listen and such failure contributed directly to his injury, he would in either event be guilty of contributory negligence precluding his recovery, and the evidence herein strongly presenting both issues. The court therefore instructs the jury that before they could believe James, Ferris guilty of contributory negligence they must believe that he failed to use both his senses of sight and his sense of hearing, the law being that if one approaching a railway crossing fails to use either his sense of sight or his sense of hearing when by the use of either he might have discovered the approach and avoided the danger, he cannot recover.

42. The court erred in paragraph No. 6 of its charge to the jury, wherein, in charging upon the negligence of Cass Ferris and Wm. B. Ashley and instructing the jury as to the circumstances under which the negligence of said parties would be imputed to deceased, James Ferris, he repeatedly and continuously charges the jury that in order for them to believe that either the said Cass Ferris or Wm. Ashley were guilty of negligence they must believe, from a preponderance of the testimony, that they, and each of them, both failed to look and failed to listen, whereas the law is that if such parties either failed to look or failed to listen for an approaching train when by the use of either sense they could have discovered the approaching train, such person would be guilty of such negligence as that if the same was imputable to said James Ferris he could not recover, nor can his heirs in this suit.

43. The court erred in paragraphs Nos. 5 and 6 of its charge to the jury, wherein it instructs the jury, as above set out, that before they can find deceased, James Ferris, guilty of contributory negligence, precluding a recovery by his heirs, they must believe that he both failed to look and failed to listen before approaching the crossing, and in refusing to give special charges Nos. 4, 6, 16, 24*a*, and

185 25, in each of which charges this defect of the court's charge is sought to be remedied and in each of which charges the jury is instructed that a failure to look or a failure to listen, if under all the circumstances negligent and contributing to the injury, will preclude a recovery.

44. The court erred in its charge to the jury in failing and refusing to submit to the jury defendant's special plea of contributory negligence by reason of the intoxication of James Ferris, which rendered him incapable of exercising ordinary care, by reason whereof the injury occurred, and in refusing to give special charge No. 12

asked by the defendant, which instructed the jury that if they believed that at the time of the collision said James Ferris was so far under the influence of intoxicating liquor that he was incapable of exercising ordinary care, and that he did so fail, and that such failure was the direct and proximate cause of the injury, they would find for the defendant.

45. The court erred in instructing the jury, in paragraph No. 4 of its charge, that it was the duty of the engineer and fireman while approaching the crossing to keep "a lookout to discover persons upon or about to enter upon the said crossing that a man of ordinary prudence would have done under the same circumstances," and that if they failed to keep such lookout, and such failure was the proximate cause of the injury, that they should find for the plaintiff, and in refusing to give in connection therewith special charge No. 1 asked by defendant, to the effect that an engineer who sees persons or teams approaching or waiting to pass over a crossing is not bound to anticipate that such persons will undertake to pass in advance of the approaching train; and in failing to give special charge No. 10 asked by defendant, to the effect that if the servants of defendant in charge of the train saw the wagon in which deceased was riding stop before reaching the crossing, and that it reasonably appeared to them, acting with reasonable care, that such wagon would make no attempt to pass the crossing until after the train passed, then it was not negligence for such servants not to stop the train; and in failing to give special charge

No. 23 asked by defendant, that the lookout of those in
186 control of the engine should be confined to defendant's track; and in failing to give special charge No. 22 asked by defendant, that if the appearance of deceased upon the track was so unexpected that it left defendant's agents no time to stop the train, they would find for the defendant; and in failing to give special charge No. 20 asked by defendant, to the effect that if the evidence showed that deceased was off the track and out of reach of the train when he came in view of those in charge of the train, and went upon the track after the train had approached so near that it could not be stopped with ordinary care, that then plaintiffs could not recover; and in refusing to give charge No. 28 asked by defendant, to the effect that the duty of those in charge of defendant's train did not require them to assume that persons approaching the crossing would undertake to cross the same in advance of an approaching train, but that they had the right to assume that such parties would stop before undertaking the crossing and allow the train to pass, and that if they believed that at the time the fireman, J. W. Slocum, saw deceased and his companions they had stopped at the foot of the approach to the crossing, he had the right to assume that they intended to permit the train to pass, and that if the jury believed that thereafter deceased and his companions whipped the horses upon the track immediately in front of the engine, and in such close proximity thereto that defendant's servants could not see the same in time to prevent the injury, that then they should find for the defendant. The charge of the court, therefore, instructed the jury

that if they failed to keep a lookout defendant was liable, and wholly failed, though specially requested, to explain in any manner whatsoever in what proper lookout consisted, and left the jury wholly without guidance to respond to the argument made by plaintiffs' counsel that it was their duty to have seen the deceased and his companions as they approached the right of way and before they were in peril and stopped the train at such time and have thereby avoided the injury.

46. The court erred in its charge to the jury in submitting to the jury the issue as to whether the defendant was negligent in
187 permitting a switch-engine to stand near the crossing emitting steam which frightened the team by which deceased was drawn, thereby delaying his passage over the crossing, and failing to charge in connection therewith the law, as asked by defendant in special charge No. 29, that if deceased by the use of ordinary care could have seen such switch-engine, and nevertheless approached in such close proximity thereto that the team was frightened and he for this reason failed to look for an approaching train, and that by reason thereof the injury occurred, they would find for the defendant."

47. The court erred in paragraph No. 7 of its charge to the jury, which is as follows: "In case you shall find a verdict for the plaintiff you will assess the damages at such as under the evidence will compensate them for the pecuniary loss, if any, sustained by the death of the said James Ferris, and you will apportion the damages—that is, state how much each shall receive"—said charge being erroneous in this, that it permits the jury to ascertain what sums of money would have probably been received by plaintiffs from the earnings of deceased, and that the aggregate of these sums must be taken as the measure of damages, such a verdict giving in advance the aggregate of the sums of money which would have been received by plaintiffs during an ordinary lifetime. This is not the correct measure of damages, the law being that a jury should give such damages as they think proportioned to the injury sustained.

48. The verdict is grossly excessive and was occasioned by the continued appeals of counsel for plaintiffs to the passions and prejudices of the jury, such appeals being continued throughout the entire trial, and while rebuked continually by the court were continuously persisted in, with the evident purpose of inflaming the passions of the jury and which did inflame them until they rendered a verdict grossly excessive in amount and proportioned rather to the number of the plaintiffs than to the injury sustained.

49. The court erred in charging the jury in paragraph 4 of its charge to the jury as follows: "Or if you believe from a preponderance of the evidence that said employés who were charged
188 with that duty did not sound the whistle on the engine drawing the said train at a distance of at least 80 rods from the said crossing, and did not begin to ring the bell thereon at that point and continue to ring the same until said crossing was passed, and that such failure to sound the *bell* and ring the bell, if there was such, was the direct and proximate cause of the striking of the

wagon and killing deceased, you will find a verdict for the plaintiffs," and in refusing to charge the jury, as asked by defendant in charge No. 8, refused by the court, that if they believe that the whistle was sounded at a point more than 80 rods distant from the crossing, but at such distance beyond that it could well have been heard at the crossing by a man of ordinary good hearing, this would be a compliance with the law with regard to the blowing of the whistle.

50. The court erred in charging upon the issue of the failure of the engineer and fireman to keep a proper lookout, there being no evidence that they or either of them failed to keep a proper lookout.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Filed June 26th, 1899.
R. J. GRIESENBECK, *Clerk.*

Order Overruling Motion for a New Trial and Defendant's Notice of Appeal.

July 5, 1899.

MRS. MOLLIE F. FERRIS ET AL. *vs.* THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

Now, on this the 5th day of July, 1899, came on to be heard the above entitled and numbered cause, wherein Mollie F. Ferris, Mattie Lee, Sam. Richard Ferris, Price Franklin Ferris, Mina Kattie Ferris, Millie Caldona Ferris, Henry Cordell Ferris, Dovie Emeline Ferris, and Lovie Eveline Ferris are plaintiffs and The Missouri, Kansas and Texas Railway Company of Texas is defendant; and
189 thereupon came — to be heard defendant's motion, filed herein on June 26th, 1899, to set aside the verdict and judgment herein on June 24th, 1899, rendered and entered against it, and to grant said defendant a new trial, and the parties, plaintiff and defendant, appeared in person and by attorneys and announced ready for trial upon said motion, and the court, having heard the evidence and argument of counsel, is of the opinion that the law is with the plaintiffs. It is therefore ordered, adjudged, and decreed by the court that the said motion be, and the same is hereby, in all things overruled. Whereupon the defendant, The Missouri, Kansas & Texas Railway Company of Texas, did then and there in open court except to the action of the court overruling said motion, and did then and there in open court except to the verdict and judgment herein rendered and entered against it, and did then and there in open court give notice of appeal from the action of the court overruling said motion to the court of civil appeals of the third supreme judicial district of the State of Texas, and did then and there give notice of appeal from the judgment herein rendered and entered against it to the court of civil appeals of the third supreme judicial district.

Order Allowing the Defendant Ten Days After Adjournment of Court to File Statement of Facts, July 5, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

Now, on this the 5th day of July, 1899, came on to be heard the motion of the defendant, The Missouri, Kansas and Texas Railway Company of Texas, to be allowed ten days from and after the adjournment of this court within which to make up and file a statement of facts herein; and the court, having heard the same, is of the opinion that the same should be granted. It is therefore ordered by the court that the Missouri, Kansas and Texas Railway Company of Texas be, and it is hereby, allowed ten days from and after
190 the adjournment of this court within which to make up and file a statement of the facts herein.

Order to Forward Original Photographs and Plats as Part of the Record Herein, July 5, 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

Now, on this the 5th day of July, 1899, came on to be heard the application of the parties, plaintiff and defendant, for the court to order herein that the original photographs and plats introduced in evidence herein by both parties be transmitted to the court of civil appeals as a part of the statement of facts and the record herein, and the court, having heard the same, is of opinion that the same should be granted; it is therefore ordered by the court that all the original photographs and plats introduced in evidence herein by either party be, and the same *is* hereby, ordered to be made a part of the statement of facts herein, and the clerk is ordered to transmit said originals as part of the record herein.

Appeal Bond.

Filed July 25th, 1899. R. J. Griesenbeck, Clerk.

In the District Court of Bastrop County, Texas, June Term, A. D. 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

Whereas in the above entitled and numbered cause, pending in the district court of Bastrop county, Texas, and at a regular term of said court, to wit, on the 24th day of June, A. D. 1899, the following judgment was rendered:

In District Court of Bastrop County, Texas, June Term, A. D. 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

191 Now, on this the 20th day of June, 1899, this cause being regularly reached and called for trial, came the plaintiffs in person and by attorneys, and the defendant by attorneys, and both parties announced ready for trial; and thereupon came a jury of twelve good and lawful men, namely, Cary Royston and eleven others, who were duly tried, empannelled, and sworn, and having heard the pleadings, evidence, and argument of counsel, and having received the charge of the court, retired to consider of their verdict, and after due consideration thereof, on, to wit, June 24th, 1899, returned into open court the following verdict, which was received by the court:

"We, the jury, find a verdict for the plaintiffs against the defendant and assess their damages at the sum of $10,000; and we apportion the sum among them as follows: Mollie F. Ferris, $1,250.00; Mattie Lee, $250.00; Sam. Richard Ferris, $900.00; Price Franklin Ferris, $1,000.00; Mina Kattie Ferris, $1,100.00; Millie Caldona Ferris, $1,250.00; Henry Cordell Ferris, $1,250.00; Dovie Emeline Ferris, $1,500.00, and Lovie Eveline Ferris, $1,500.00.

CARY ROYSTON,
Foreman of the Jury."

It is therefore considered, adjudged, and decreed by the court that the plaintiffs each have and recover of and from the defendant, The Missouri, Kansas & Texas Railway Company of Texas, the damages apportioned unto him or her by the said verdict—that is to say, that the said Mollie F. Ferris, in her own right and for her own use, do have and recover of and from the defendant the sum of one thousand two hundred and fifty ($1,250.00) dollars; that the said Mattie Lee do have and recover of and from the defendant the sum of two hundred and fifty ($250.00) dollars; that the said Sam. Richard Ferris do have and recover of and from the defendant the sum of nine hundred ($900.00) dollars; that the said Price Franklin Ferris do have and recover of and from the defendant the sum of one thousand ($1,000.00) dollars; that the said Mina Kattie Ferris do have and recover of and from the defendant the sum of one thousand one hundred ($1,100.00) dollars; that the said Millie Caldona

192 Ferris do have and recover of and from the defendant the sum of one thousand two hundred and fifty ($1,250.00) dollars; that the said Henry Cordell Ferris do have and recover of and from the defendant the sum of one thousand two hundred and fifty ($1,250.00) dollars; that the said Dovie Emeline Ferris do have and recover of and from the defendant the sum of fifteen hundred ($1,500.00) dollars; that the said Lovie Eveline Ferris do have and recover of and from the defendant the sum of fifteen hundred ($1,500.00) dollars, together with all the costs by them incurred or expended in

this behalf, for which they may have their execution, and this judgment shall bear interest at the rate of six per cent. per annum.

It appearing to the court that the attorneys of record for the plaintiffs, Messrs. S. L. Staples and J. W. Parker, have a one-half interest in the recovery herein, as evidenced by written contract on file, which is deemed just and which is hereby approved, it is ordered by the court that the said interest be paid to the said attorneys or their order out of the proceeds of this judgment.

From which judgment the said Missouri, Kansas and Texas Railway Company of Texas has taken an appeal to the court of civil appeals for the third supreme judicial district, at Austin, Texas, and desires to suspend the execution of the judgment during the pending of this appeal:

Now, therefore, we, The Missouri, Kansas and Texas Railway Company of Texas, as principal, and T. C. Osborne and T. J. Trigg, as sureties, acknowledge ourselves bound to pay to Mollie F. Ferris, Mattie Lee, Sam. Richard Ferris, Price Franklin Ferris, Mina Katie Ferris, Millie Caldona Ferris, Henry Cordell Ferris, Dovie Emeline Ferris, and Lovie Eveline Ferris in the sum of twenty-two thousand dollars, conditioned that the said Missouri, Kansas and Texas Railway Company of Texas, appellant, shall prosecute its appeal with effect, and in case the judgment of the supreme court or court of civil appeals shall be against it, the said Missouri, Kansas and Texas Railway Company of Texas shall perform the sentence, judgment, or decree of said court or courts and pay all such damages as
193 said court or courts may award against it.

Witness our hands this the 24th day of July, A. D. 1899.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*
T. J. TRIGG.
T. C. OSBORN.

Approved July 25th, 1899.
R. J. GRIESENBECK, *Clerk.*

Filed July 25th, 1899.
R. J. GRIESENBECK, *Clerk.*

Assignment of Errors.

Filed July 25th, 1899. R. J. Griesenbeck, Clerk.

In District Court of Bastrop County, Texas, June Term, A. D. 1899.

MRS. MOLLIE F. FERRIS ET AL.
vs.
THE M., K. & T. R'Y CO. OF TEXAS. } No. 1884.

Herein comes The Missouri, Kansas and Texas Railway Company of Texas, appellant, and for error herein assigns the following:

First Assignment of Error.

Said verdict and judgment are contrary to and not supported by the evidence, in this: The evidence shows that the death of the said James Ferris was caused by his own contributory negligence, in that he approached the railroad crossing where the accident occurred, with which he was thoroughly familiar, and at a time when he knew the train which struck him was due, in a state of intoxication, and that although said crossing was so situated that for at least 400 yards a person approaching the same along the route pursued by said Jamas Ferris could see at every point along said route a train approaching said crossing from the north for at least a distance of 600 yards, and although the view of said James Ferris of said approaching train was absolutely clear and unobstructed from the time said train was 600 yards distant until it reached said
194 crossing, which plain, clear, and unobstructed view said James Ferris had at every moment during the time he was traversing the 400 yards before reaching said crossing and at the time he entered upon the same; that nevertheless he wholly failed to use either his senses of sight or hearing, and wholly failed to stop or to look or to listen before entering upon said crossing to ascertain whether any train was approaching, but recklessly and negligently, while under the influence of intoxicating liquors, attempted to cross said track in front of an approaching train, which he either saw or by the use of ordinary care could have seen approaching said crossing, and that at the time and place of the accident he wholly failed to use such ordinary care as would govern the actions of an ordinarily prudent man under the same circumstances, which negligence directly and proximately contributed to his injury.

Second Assignment of Error.

Said verdict and judgment are contrary to and not supported by the evidence, in this: Said evidence shows that the injury complained of was caused by the negligence of Cass Ferris and William Ashley, jointly and severally, which said negligence was imputable to the said James Ferris, in this, that at the time and place of the accident the said William Ashley and Cass Ferris were each under the influence of intoxicating liquors to such an extent that they were wholly unable to prudently control said team and drive said wagon or to prudently approach said crossing, all of which James Ferris knew before taking passage with them in said wagon; that said Cass Ferris and William Ashley were each familiar with said crossing and knew that the train causing the collision was due at or about the time of the collision; that said Cass Ferris, notwithstanding his intoxication, was attempting to drive said wagon, and said William Ashley, notwithstanding his intoxication, was attempting to participate therein, all of which deceased well knew at the time he took possage in said wagon and before and at the time he undertook to pass said crossing; that the said Cass Ferris and William Ashley, to whose care deceased had thus voluntarily committed himself,

wholly failed to stop or to look or to listen for an approach-
195 ing train, or to use either their senses of sight or hearing for that purpose, notwithstanding there was no obstruction of any kind to cut off the view of such train for at least 600 yards to the north of said crossing as they entered upon the right of way and upon the approach to said crossing and for several hundred yards upon their route thither, and they, the said Cass Ferris and William Ashley, jointly and severally, failed to act with ordinary care and prudence in undertaking to pass said crossing without stopping or looking or listening for said train, or if they did see the same in undertaking to pass over and cross in advance thereof, which negligence proximately contributed to the injury herein complained of and which, by reason of the fact that the said deceased was engaged in the joint and common enterprise with said Cass Ferris and William Ashley and by reason of the fact that he, the deceased, had committed himself to their control and carriage, well knowing their incapable and intoxicated condition, was imputable to the deceased, James Ferris.

Third Assignment of Error.

Said verdict is contrary to and not supported by the evidence, in this, that the evidence conclusively shows that at the time and place of the injury the deceased was intoxicated and incapable of exercising ordinary care and prudence, and that the injury was the direct and proximate result thereof.

Fourth Assignment of Error.

The verdict and judgment are contrary to and not supported by the evidence, in this, that the overwhelming preponderance of the testimony shows that the servants and agents of the defendant railway company were guilty of no act of negligence herein; that the whistle was blown and the bell rung as said train approached the crossing, as demanded by statute; that proper lookout was kept and proper warning of the approach of said train given, and that said accident was caused, not by the negligence of this defendant, its servants or agents, but by the inexcusable negligence of the deceased and his associates.

196 *Fifth Assignment of Error.*

The verdict and judgment herein are contrary to and not supported by the evidence, in this: That the amount of damages adjudged by the jury against this defendant, to wit, the sum of ten thousand dollars, is grossly excessive and extraordinary, in this, that the proof shows that the value of the labor of the deceased was not more than five or six hundred dollars per year; that he was a renter, renting from thirty to forty acres per year; that the total value of his labor was not more than seven hundred dollars per year, and that out of this was deducted the rent due his landlord and other expenses, making the sum of not more than five hundred dollars per

year the highest possible estimate of the value of his labor per year, and that even this estimate, it is believed, is of necessity higher than can be justified under the evidence herein.

Sixth Assignment of Error.

The evidence shows herein that Mrs. Mattie Lee is a married woman and without pecuniary interest in the life of her father, and that she was entitled to no consideration for his death, and that said verdict is excessive to the amount adjudged in her favor therein.

Seventh Assignment of Error.

The evidence herein shows that Mrs. Mattie Lee, who sues alone, is a married woman and not entitled to recover, there being no allegation in the pleadings that she has been abandoned by her husband or that he refuses to join in this suit.

Eighth Assignment of Error.

The court erred in permitting the witness T. C. Wilson to testify, over the objection of defendant, that the crossing in question had been used by the general public ever since witness had been in Smithville, about three years; that it was used considerably, and that it was so used on the 28th of January of this year; to which the defendant objected upon the ground that there was no allegation in plaintiffs' pleadings to justify the same, the only allegation being
197 that the crossing was a public road and street, as will more fully appear from bill of exceptions No. one.

Ninth Assignment of Error.

The court erred in refusing to take as confessed the interrogatories propounded to Sam. and Frank Ferris under the provisions of chapter 3, title 40, of the Revised Statutes, relating to *ex parte* interrogatories, and in refusing to sustain the motion of defendant that the said Sam. Ferris should not be permitted to testify concerning the matters covered by such interrogatories, for the reason that the statute of 1897, forbidding the taking of *ex parte* interrogatories where a corporation is a party, is contrary to and in conflict with the 14th amendment of the Constitution of the United States, in this, that it deprives defendant corporation of the equal protection of the laws, as will more fully appear from the defendant's bill of exceptions No. 2.

Tenth Assignment of Error.

The court erred in failing and refusing to give charge No. 1 asked by the defendant, which is as follows: "If an engineer in charge of a locomotive drawing a passenger train see persons or teams approaching or waiting to cross the railroad, he is not bound to anticipate that they will attempt to cross in front of the train, and

therefore he is not required to check his speed so much as would be necessary to enable them to cross in front of such locomotive."

Eleventh Assignment of Error.

The court erred in refusing to give charge No. — asked by the defendant, as follows: "You are charged that one in approaching a railroad crossing cannot relieve himself of the care which he must exercise as an ordinarily prudent man upon the presumption that the railroad company is going to perform its duty, and thereby justify him in going upon the crossing without the exercise of proper care upon his part, and defendant's failing to ring the bell or blow the whistle, or the fact that its train may have been running at a rate of speed which you may consider improper, should you so believe, does not relieve such person of the care which he must
198 exercise as a man of ordinary care and prudence to ascertain if the train is approaching and if it would be dangerous to attempt to make the crossing."

Twelfth Assignment of Error.

The court erred in refusing to give charge No. 3 asked by the defendant, as follows: "It is the duty of one approaching the railroad crossing to exercise the care and prudence that a man of ordinary care would exercise under the same circumstances, and if you should believe that in the exercise of such care it was the duty of James Ferris to have stopped before driving upon said railway, and that he failed to do so, or if you should find that in the exercise of such care it was his duty to look and listen for the approaching train, and that he failed to do so, and you should find that under all the circumstances he was negligent, and that such negligence contributed to the injury herein complained of, you will in that event return a verdict in favor of the defendant."

Thirteenth Assignment of Error.

The court erred in paragraph 5 of its charge to the jury in failing to charge that if the jury believed that under all the circumstances of the case an ordinarily prudent man would have stopped before approaching said crossing, and that deceased did so fail, and that said failure contributed to the injury complained of, they should find for the defendant, the court thereby eliminating the failure of the deceased to stop, if he did so fail, from the case as proof of negligence.

Fourteenth Assignment of Error.

The court erred in paragraph 6 of its charge to the jury wherein he instructed the jury as to what negligence of Cass Ferris and William Ashley would be imputable to deceased, Ferris, in this, that in said paragraph he eliminated from the consideration of the jury the failure of said parties or either of them to stop as an element of neg-

ligence herein, the proof tending to show that they failed to stop, and that under the circumstances of this case such failure was negligence.

199 *Fifteenth Assignment of Error.*

The court erred in failing and refusing to give charge No. 4 requested by the defendant, as follows: "The fact that the attention of deceased, James Ferris, may have been diverted by the switch-engine near by or by the misbehavior of the team, and that his attention being drawn thereto he was rendered inattentive to his real danger, does not relieve said James Ferris from the necessity of looking and listening for approaching trains, and although you should believe that his attention was so diverted, yet if you further believe that he failed to look or listen for an approaching train, and that under all the circumstances he failed to act with the care that a reasonably prudent man would under the circumstances, and that said negligence contributed to his injury, you will find for the defendant."

Sixteenth Assignment of Error.

The court erred in refusing to — charge No. 5 asked by the defendant, as follows: "Although you should believe from the evidence that the crossing along and over which the deceased, James Ferris, was endeavoring to pass may have been constructed in an improper manner, or that it was not wide enough to permit a team to be turned around after starting on the approach thereto, yet if you should believe that deceased, James Ferris, was acquainted with such crossing and familiar therewith, then it is the duty of the deceased to have more carefully looked and listened for trains before going upon said approach, and if you believe from the evidence that deceased's view was unobstructed, and that he saw or could have seen the train approaching, before going on the approach to said crossing, by looking, it was his duty to do so, and if he failed to look, or if he did look and saw the train approaching, he cannot be heard to complain of the narrowness of said approach, and if under all the circumstances you believe that he failed to use ordinary care and diligence to ascertain the approach of said train or in attempting to cross before it, if he did discover it, and under all the circumstances he was negligent, then you are instructed that deceased could not urge the nar-
200 rowness of said crossing or other defect, if any, as an excuse for his negligence, and you will find a verdict for the defendant."

Seventeenth Assignment of Error.

The court erred in its charge to the jury in wholly failing and refusing to attempt to apply the law of contributory negligence to the facts of this particular case, and failing and refusing to affirmatively present to the jury defendant's defense of contributory negligence, and in failing and refusing to give charge No. 6 requested by defendant for the purpose of obviating said defects, as follows: "The defendant railway company in this case, in addition to the general

denial, by which it denies that it has been guilty of any negligence in any of the particulars charged by the plaintiffs, or that such negligence, if any, was the cause of the injury complained of, pleads that the deceased, James Ferris, was himself negligent, and that his said negligence contributed directly and proximately to his injury. This is what is known in law as the defense of contributory negligence, under which you are instructed that even though you should believe that on the occasion herein enquired about the servants and agents of defendant company were negligent, and that such negligence contributed to the injury of James Ferris, yet if you further believe that the said James Ferris was also negligent, and that his negligence contributed to and co-operated with the negligence of defendant's servants in producing the injury, in that event the plaintiffs cannot recover; in other words, if both parties are negligent and the negligence of each proximately contributes to the injury, there can be no recovery; hence in this case, although you might believe that at the time of the collision the agents of the defendant were propelling the train at a rate of speed greater than a prudent man would have done under all the circumstances, or that they failed to ring the bell or blow the whistle as required by the statute, or failed to use ordinary care in any of the particulars set out in the charge heretofore given by you, or that such agents were guilty of all of said acts and omissions, and that under all the facts and circumstances of the
201 case they were negligent, and that such negligence directly contributed to the injury of the said James Ferris, yet if you should further believe that the said James Ferris was familiar with the said crossing and its approaches; that he knew that this particular train was due at said crossing at or about the time it did reach there; that at the time he was so far under the influence of intoxicating liquors as to be incapable of prudent action; that at the time he approached said crossing Cass Ferris and William Ashley were under the influence of liquor to such an extent as to render them unable to prudently drive and direct a team and wagon, and that the deceased, James Ferris, knew this at the time he embarked in said wagon; that said wagon was open and without cover; that deceased had a clear, plain, and unobstructed view of defendant's track at said crossing and for a long distance to the north thereof and to the south thereof, for a long distance before he reached said crossing and on the approach thereto and at said crossing, and that there was nothing to obstruct his view of an approaching train, and that by the use of ordinary care he could have seen or heard said train approaching from the north; that he did not look or listen to ascertain whether a train was approaching, or that if he did see such train approaching the crossing he endeavored to cross in advance thereof, and that if you believe that under all the facts in evidence, taken together, that the deceased, James Ferris, in attempting to pass over said crossing in advance of the approaching engine, failed to act with ordinary and reasonable care and prudence of an ordinarily prudent and careful man under the same circumstances, and that such failure to act with ordinary care proximately contributed to the injury of

the said James Ferris, then, in that event, you will find a verdict in favor of the defendant."

Eighteenth Assignment of Error.

The court erred in failing to give charge No. 7 asked by defendant, as follows: "If you believe from the evidence that the deceased, James Ferris, saw the engine approaching and nevertheless undertook, in a wagon drawn by two horses, to cross in full view of
202 such train, which was then and there in dangerous proximity to such crossing, and that such conduct would constitute negligence on the part of deceased, you will find for the defendant, provided that such negligence contributed to the injury of the deceased."

Nineteenth Assignment of Error.

The court erred in failing and refusing to give charge No. 8 asked by defendant, as follows: "It was the duty of defendant's employés operating the engine which came in contact with the wagon in which deceased, James Ferris, was riding to give signals of its approach by ringing the bell and blowing the whistle at the distance of at least eighty rods from the crossing where the collision occurred. The object of these requirements is to protect travelers on the highway approaching the crossing, and it is not required that these signals should be given at exactly eighty rods; and if you believe in this case that the whistle of defendant's engine was sounded at a point more than eighty rods distant from the crossing, but at such distance beyond that it could well have been heard at such crossing by a man of ordinarily good hearing, this would be a compliance with the law with regard to the blowing of such whistle."

Twentieth Assignment of Error.

The court erred in refusing to give charge No. 9 asked by the defendant, as follows: "If you believe from the evidence that James Ferris and his companions or either of them saw the approaching train and stopped to permit it to pass by, and that thereafter Cass Ferris and William Ashley, without fault on the part of James Ferris, after seeing such train approaching and without ordinary care, urged the horses on the track in front of the train, and that under all the circumstances the parties so urging the horses upon the track were negligent, and that such negligence contributed to the jury, and if you believe that the parties so urging said horses on the track in advance of the approaching train did so because he was under the influence of intoxicating liquor, and was then and there incapable of directing and controlling the team and wagon
203 as a man of ordinary care and prudence would, and that the said James Ferris knew such fact before taking passage on such wagon and voluntarily approached such crossing in charge of one in such condition, then, in that event, the negligence of said Cass Ferris and William Ashley would be imputable to said James

Ferris, and you will find a verdict in favor of the defendant, even though you should believe that the defendant's agents were negligent also."

Twenty-first Assignment of Error.

The court erred in failing to give charge No. 10 asked by defendant, as follows: "If the defendant's employees in charge of its engine saw the wagon in which deceased was riding stop before reaching the railway, and if it reasonably appeared to them, acting with such reasonable care as would govern a man of ordinary prudence under like circumstances, that such wagon would make no attempt to cross such railway until after such train had passed such crossing, then you are instructed that it would not be negligence for such employees not to stop such engine."

Twenty-second Assignment of Error.

The court erred in refusing to give charge No. 11 asked by defendant, as follows: "Although you believe that the deceased, James Ferris, was at the time and place of the accident chargeable with no individual negligence, yet if you believe that at the time he, the said James Ferris, was engaged jointly with Cass Ferris and W. D. Ashley in driving said wagon, the same being then and there a joint and common enterprise, and the said James Ferris participated in the direction, government, and control of the wagon and team, and that said Cass Ferris and W. D. Ashley or either of them was so far intoxicated or under the influence of liquor as to render it unsafe for them or either of them to undertake to pass such crossing, and that such fact was known to deceased, James Ferris, at the time he embarked in said wagon, and — at the time and place of the accident the said Cass Ferris and W. A. Ashley or either of them failed to act with ordinary care and prudence, which failure to act with ordinary care and prudence contributed to the injury of said
204 James Ferris, then, in that event, the negligence, if any, of said Cass Ferris and W. D. Ashley or either of them would be imputable to said James Ferris, and plaintiffs cannot recover, even though you should believe that defendant's servants and agents were negligent, and that such negligence contributed to the injury complained of, and in such event you will find a verdict in favor of defendant."

Twenty-third Assignment of Error.

The court erred in failing to give charge No. 12 asked by defendant, as follows: "If you believe that at the time and place of the accident the said James Ferris was so far under the influence of intoxicating liquor as to be unable to exercise ordinary care in passing such crossing, and that at such time he did fail to use such ordinary care, and such failure to use ordinary care contributed proximately to his injury, you will in that event find for the defendant, even though you should believe that its servants were at

the time and place negligent, and that such negligence contributed to the injury of said James Ferris."

Twenty-fourth Assignment of Error.

The court erred in failing to give charge No. 13 asked by defendant, as follows: "If you believe that Cass Ferris and W. D. Ashley or either of them, in approaching said crossing, failed to act with the care and prudence which a man of ordinary care and prudence would use under the circumstances, and that such failure was the sole cause of the accident, you will find in favor of the defendant."

Twenty-fifth Assignment of Error.

The court erred in failing to give charge No. 14 asked by the defendant, as follows: "If you believe from the evidence that Cass Ferris and W. D. Ashley or either of them were drunk or so far under the influence of intoxicating liquor as to render him or them an unsafe driver, and that the deceased, James Ferris, knew this or by the exercise of ordinary care could have known it, and that by reason of such intoxication such person failed to use reasonable care, whereby the injury occurred, then the negligence, if any, of such person would be imputed to James Ferris, and you will find
205 for the defendant, even though you might believe that its servants and agents had also been negligent."

Twenty-sixth Assignment of Error.

The court erred in failing to give charge No. 15 asked by the defendant, as follows: "A railroad track is of itself a warning of danger to those who go upon it, and persons about to cross a railroad track are bound to recognize the danger and to make use of their senses of sight and hearing to ascertain, before attempting to cross it, whether a train is in dangerous proximity, and if they neglect to do this, but venture blindly and carelessly upon the track, without effort to ascertain whether a train is approaching, it must be at their own risk."

Twenty-seventh Assignment of Error.

The court erred in failing to give charge No. 16 asked by the defendant, as follows: "If you believe that James Ferris, the deceased, was engaged, together with Cass Ferris and W. D. Ashley, in the common and joint enterprise of driving an open wagon, in which common and joint enterprise the deceased was co-operating with and assisting the said Cass Ferriss and W. D. Ashley, and that the said Cass Ferris or W. D. Ashley was under the influence of liquor and failed to stop, and to look or listen for an approaching train as they approached the said crossing, and that they, the said Cass Ferries and W. D. Ashley, failed to use ordinary care to ascertain the approach of a train — by the use of their senses of sight *or* hearing, they could have ascertained the same, and that under all the cir-

cumstances of the case they or either of them were negligent, and that such negligence contributed directly to the injury of James Ferris, then you are instructed that under the law the negligence of such party is the negligence of James Ferris, and there can be no recovery herein, even though you should believe that the servants and agents of defendant were negligent, and that such negligence contributed directly to the injury, and if you should so believe, you will find for the defendant."

Twenty-eighth Assignment of Error.

The court erred in failing to give charge No. 17 asked by
206 the defendant, as follows: "It is not the duty of those in charge of a railway engine to keep a lookout for parties approaching the crossing. It is their duty in approaching a railway crossing to blow the whistle and ring the bell as charged and to use reasonable care, and if any person, notwithstanding such signals and care, is discovered on the track at the crossing, to use reasonable care to avoid injuring them, after such discovery, but it is not the duty of persons in charge of the engine to keep a lookout for those approaching the crossing, and a failure to do so does not constitute negligence."

Twenty-ninth Assignmeat of Error.

The court erred in failing to give charge No. 18 asked by defendant, as follows: "Failure to ring the bell or blow the whistle, or the failure of the railway company to use the proper care and diligence in approaching the crossing, would not excuse the deceased, James Ferris, from the exercise of proper care; the duties of each in this respect are reciprocal, and although the railway company may have failed to perform its duty in the premises, still, if the deceased by the exercise of reasonable care, *he* could have avoided the accident, he would be guilty of contributory negligence, and should you so believe, you will find for the defendant."

Thirtieth Assignment of Error.

The court erred in failing to give charge No. 19 asked by defendant, as follows: "It was the duty of the servants and agents of defendant in charge of running a train upon its track in approaching a crossing upon its track to ring the bell or blow the whistle to indicate the approach of the train. The use of these signals is prescribed for the safety of those in the neighborhood of approaching trains, but the failure to perform the duty of ringing the bell or blowing the whistle would not relieve a person in danger from the duty of using his senses to ascertain the presence of an approaching train, and if such person was aware of the presence of the train, the failure of the servants and agents of the defendant to ring the bell and blow the whistle would be immaterial."

207 *Thirty-first Assignment of Error.*

The court erred in failing to give charge No. 20 asked by defendant, as follows: "If the evidence shows that the deceased, James Ferris, was off the railroad track and out of the reach of the train when the place where he was came within the view of those in charge of the train, and went upon the track after the train approached so near him that the train could not be stopped by the defendant's servants by the use of ordinary care and prudence, using all means usual for stopping such train in time to avoid the danger, and that all such means were used at the time, then plaintiffs cannot recover, and you will return a verdict in favor of the defendant."

Thirty-second Assignment of Error.

The court erred in failing to give charge No. 21 asked by the defendant, as follows: "An inevitable accident is one that cannot be anticipated and provided against by human foresight; for such an accident there is no legal liability. If you believe that the accident herein complained of was an inevitable accident, you will find for the defendant."

Thirty-third Assignment of Error.

The court erred in failing to give charge No. 22 asked by the defendant, as follows: "If from the evidence you should believe that the appearance of said James Ferris upon the track was so sudden and unexpected that it left no time to stop the train and avoid the injury, then plaintiffs cannot recover, and you will find a verdict in favor of the defendant."

Thirty-fourth Assignment of Error.

The court erred in failing to give charge No. 23 asked by defendant, as follows: "The running by defendant of trains upon its track was authorized by law, and the law did not impose any rule as to the rate of speed of such train. The defendant was entitled to its track for its trains to run upon, and its servants and agents in charge of a running train had the right to act upon the presumption that the right of way for trains would be respected by persons
208 approaching the track. This, however, would not excuse a negligent running upon and over a person upon the track. It was the duty of the servants and agents of defendant in charge of a running train on tracks at all times, and especially in passing through towns and in approaching crossings where people were accustomed to pass, to keep a lookout for persons on its track, and if a person is seen upon its track and in danger, to check or halt the train, if it could be done by the use of ordinary care and by the use of ordinary means, to avoid inflicting injury on such persons."

Thirty-fifth Assignment of Error.

The court erred in refusing to give charge No. 24 asked by defendant, as follows: "You are instructed that while it is the duty of the servants and agents of a railway company to keep a lookout for obstructions upon its track at crossings, and to use ordinary care to prevent collisions therewith, yet it is not their duty to keep a lookout to ascertain whether persons are approaching said crossings or not, and that if they see such persons, they have the right to assume that they will not undertake to drive upon the track in front of an advancing train, and it is not the duty of those operating such trains to slacken its speed or to stop the train for the purpose of permitting such persons to pass over the track; hence, although you should believe in this case that the fireman, J. W. Slocumb, saw deceased, James Ferris, and his companions approaching said crossing in a wagon, and that at said time they were at or upon the approach to said crossing, as testified to by him, then he had the right to assume that they would not undertake to go upon and over such crossing in advance of such approaching engine, and it was not the duty of such engineer and fireman to stop said train or slack the speed thereof on that account, and if you should believe that after said engine had approached so near the said crossing that the agents of the company were unable to stop the same, that deceased and his companions drove suddenly upon the track in advance of the engine and was struck, and that, under all the circumstances, — failed
209 to use ordinary care, which failure to use ordinary care proximately contributed to his injury, you will return a verdict in favor of the defendant."

Thirty-sixth Assignment of Error.

The court erred in failing to give charge No. 24*a* asked by the defendant, as follows: "The defendant company in this case, in addition to the general denial, by which it denies that it has been guilty of any negligence in any of the particulars charged by the plaintiffs, or that such negligence, if any, was the cause of the injury complained of, pleads that the deceased, James Ferris, was himself negligent, and that those in the wagon with him were negligent in such manner as is imputable to him, and that such negligence contributed directly and proximately to his injury; this is what is known in law as contributory negligence, under which you are instructed that even though you should believe that on the occasion herein inquired about the servants and agents of the defendant were negligent, and that such negligence contributed to the injury of James Ferris, you will, if you further believe that James Ferris was also negligent, or that Cass Ferris or William Ashley, or either of them, were negligent under such circumstances as that their negligence would be imputable to James Ferris under the charge hereinbefore given you, and that such negligence contributed to and cooperated with the negligence of defendant's servants in producing the injury complained of, in that event plaintiffs should not recover

In other words, if both parties were negligent and the negligence of each approximately contributes to the injury, there can be no recovery; hence, in this case, although you might believe that they failed to ring the engine bell or blow the whistle, as required by statute, or failed to keep a proper lookout, or that they were propelling said train at a greater rate of speed than would have been used by men of ordinary care, or that they were negligent in any of the particulars of this charge hereinbefore given you, and that such negligence directly contributed to the injury of the said James Ferris, yet you are instructed that if you further believe that the said James Ferris was familiar with the crossing at its
210 approaches, that he knew that this particular train was due at said crossing at or about the time it did reach there, that at the time of the collision he was so far under the influence of intoxicating liquors as to be incapable of prudent action, and that at the time they approached said crossing Cass Ferris and William Ashley were under the influence of liquors to such an extent as to render them unable to prudently drive, direct, and control a team on and over said crossing, and that deceased, Ferris, knew this at the time he embarked in the wagon, and that said wagon was open, without cover or coverings, and that each of the occupants thereof had a clear and unobstructed view of defendant's track at said crossing and for a long distance to the north thereof, as well as to the south, before reaching the said crossing and the approach thereto and at the same, and that there was nothing to obstruct his view of the approaching train, and that by the use of ordinary care he could have seen or heard said train approaching from the north, and that he did not look or listen to ascertain whether or not a train was approaching, or that if he did see said train he attempted to cross in advance thereof when it was at such distance from the crossing that a man of ordinary prudence would not have undertaken to make the crossing in front of it, and if you believe, under all the facts in evidence taken together, that the deceased, James Ferris, in attempting to cross over the said crossing at the time and in the manner and under the circumstances developed in the evidence, failed to act with that ordinary and reasonable care and prudence which would characterize the action of an ordinarily careful and prudent man under the same circumstances, and that such failure to act with ordinary care proximately contributed to his injury, then and in that event you will find a verdict in favor of the defendant."

Thirty-seventh Assignment of Error.

The court erred in failing to give charge No. 25 asked by defendant, as follows: "The jury is instructed that a railroad track is in itself a warning of danger to those who go upon it, and those about to cross it are bound to recognize the danger and make use of their senses of hearing and sight, and if either cannot be made
211 available, the obligation to use the other is stronger, to ascertain before attempting to make the crossing whether or not a train is approaching, and if one neglects to do this, but carelessly or

recklessly ventures upon the track and is injured, it is at his own peril, and if you believe from the evidence that in approaching said crossing the view of a train approaching from the north was unobstructed, and deceased saw or could have seen by looking for such train as it approached, and if you believe that deceased, James Ferris, by the use of ordinary care, could have seen such approaching train, and that he did not use such care, or that he could have heard such train approaching by the use of ordinary care, or if you should believe that he saw such train and nevertheless undertook to cross in front of the same, and that under all the circumstances he failed to act with that care which would govern an ordinarily prudent man under the same circumstances and was negligent, and that such negligence contributed to his injury, you will find for the defendant."

Thirty-eighth Assignment of Error.

The court erred in failing to give charge No. 26 asked by the defendant, as follows: "You are instructed that the law provides no particular rate of speed at which a railroad train shall approach a public crossing, and it is for you to determine under all the facts and circumstances of this case whether or not said train, in approaching this crossing, did so at an improper rate of speed, and whether or not under all the circumstances of this case the servants and agents of the defendant failed to use ordinary care in propelling said train at the rate of speed used; but you are further instructed that even though you should believe from the evidence that said train was being propelled at such rate of speed as was improper and imprudent, that nevertheless this would not justify the deceased in failing to use due care and diligence in approaching said crossing, and you are further instructed that a person approaching the crossing has no right to presume that a train approaching the
212 same is being propelled at any particular rate of speed, and if he sees a train approaching within such distance of the crossing that a man of ordinary care would not undertake to make such crossing, and that nevertheless he does so, and that under all the circumstances he failed to act as a man of ordinary prudence would under the same circumstances, and that such failure contributed to his injury, you will in that event find for the defendant."

Thirty-ninth Assignment of Error.

The court erred in failing to give charge No. 27 requested by the defendant, as follows: "The law does not regulate the rate of speed at which trains shall be run in passing through the towns and cities, and if you believe that the servants and agents of the defendant in approaching the crossing in this case gave proper warning of the approach of said train by ringing the bell and blowing the whistle, and that from the situation of the said crossing a person of ordinary care and prudence, in approaching the same in the manner used by the said James Ferris, could have seen or heard the same in time to have avoided going upon said crossing, then you will find a verdict

in favor of the defendant, even though you may believe that said train was running at a high and unusual rate of speed."

Fortieth Assignment of Error.

The court erred in failing to give charge No. 28 asked by the defendant, as follows: "You are instructed that the duties of the servants and agents of the defendant railway company in charge of the train which collided with the wagon on the occasion under investigation did not require them to assume that persons approaching the crossing would undertake to cross in advance of the approaching engine, but they had the right to assume that such parties would stop before undertaking to make the crossing; hence if you believe that the fireman, J. W. Slocumb, saw the wagon containing the deceased approaching the crossing, and that at such time they were stopped at or near the foot of the crossing, then he had the right to assume that they intended to permit the train to pass over
213 the crossing before deceased undertook to pass it; and if you believe that deceased and his companions whipped the horses upon the track immediately in front of the engine, and in such close proximity thereto that defendant's servants and agents could not see the same, or, if they did see it, not in time to prevent the accident, you will find for the defendant."

Forty-first Assignment of Error.

The court erred in failing to give charge No. 29 asked by the defendant, as follows: "Although you should believe from the evidence that the team of Cass Ferris became frightened, that it engaged the attention of Cass Ferris and the deceased, and if you should further believe that the same was caused by a switch-engine standing near the crossing and emitting steam, yet if you should further believe that the deceased saw, or by the use of ordinary care could have seen, such switch-engine, and that they nevertheless undertook to pass in close proximity to such engine, and that thereby such animal- became frightened and so drew their attention that they failed to notice or listen for an approaching train, and that by reason of such failure the injury occurred, then and in that event the fact that the animals became frightened will not excuse them from exercising ordinary care to watch for and listen for an approaching train, and if they did so fail, and such failure was the cause of the accident, you will find for the defendant."

Forty-second Assignment of Error.

The court erred in refusing to permit the witness Mollie Ferris in this case to testify that on the day succeeding the death of her husband, and before his body had reached home, she made and entered into a written contract with an attorney for the bringing of this suit, as per bill of exceptions No. 3, said testimony being material for the reason that said plaintiff seeks damages herein for the loss

of the society and comfort of her deceased husband, and the fact that she would enter into such a contract at a time when the ordinary dictates of the human heart would suggest profound grief and uncontrollable emotion tends strongly to show that said
214 plaintiff is made of such stuff as that she was not suffering materially from the loss of the society of her husband and the comfort incident to the marital relation, and that she valued him dead rather than living.

Forty-third Assignment of Error.

The court erred in paragraph No. 5 of its charge to the jury, which is as follows: "If, however, you believe from the preponderance of the evidence that the said James Ferris in approaching the said crossing in a wagon failed to look and listen for an approaching train, and you believe that a man of ordinary care would have looked and listened under the circumstances for a train before entering upon the said crossing and railway, and that his failure to look and listen directly and proximately contributed to the striking of the wagon and his death, you will find a verdict for the defendant, and this, too, though you may believe the defendant did not use ordinary care in running its train up to and over said crossing," said charge of the court being erroneous in this, that it distinctly instructs the jury that before they can find that James Ferris was negligent they must believe from the preponderance of the evidence that he must both fail to look and fail to listen, whereas the law is that if he either fails to look or fails to listen, and such failure contributed directly to his injury, he would in either event be guilty of contributory negligence, precluding his recovery, and the evidence herein strongly presenting both issues. The court therefore instructs the jury that before they could believe James Ferris guilty of contributory negligence they must believe that he failed to use both his sense of sight and his sense of hearing, the law being that if one approaching a railway crossing fails to use either his sense of sight or his sense of hearing, and by the use of either he might have discovered the approach of the train and avoided the danger, he cannot recover.

Forty-fourth Assignment of Error.

The court erred in paragraph No. 6 of its charge to the jury, wherein, in charging upon the negligence of Cass Ferris and William B. Ashley and in instructing the jury as to the circum-
215 stances under which the negligence of the said parties would be imputed to the deceased, James Ferris, he repeatedly and continuously charged the jury that in order for them to believe that either the said Cass Ferris or William Ashley were guilty of negligence, they must believe from the preponderance of the testimony that they and each of them both failed to look and failed to listen, whereas the law is that if such parties either failed to look or failed to listen for an approaching train, when by the use of either sense they could have discovered the approaching train, such persons

would be guilty of such negligence as that if the same was imputable to said James Ferris, nor can his heirs in this suit.

Forty-fifth Assignment of Error.

The court erred in paragraphs Nos. 5 and 6 of its charge to the jury, wherein it instructs the jury, as above set out, that before they can find the deceased, James Ferris, guilty of contributory negligence precluding a recovery by his heirs, they must believe that he both failed to look and failed to listen before approaching the crossing, and in refusing to give special charges Nos. 4, 6, 16, 24*a*, and 25, in each of which charges this defect of the court's charge is sought to be remedied, and in each of which charges the jury is instructed that a failure to look or a failure to listen, if under all the circumstances negligent and contributing to the injury, will preclude a recovery.

Forty-sixth Assignment of Error.

The court erred in its charge to the jury in failing and refusing to submit to the jury defendant's special plea of contributory negligence by reason of the intoxication of James Ferris, which rendered him incapable of exercising ordinary care, by reason whereof the injury occurred, and by refusing to give special charge No. 12 asked by the defendant, which instructed the jury that if they believed that at the time of the collision said James Ferris was so far under the influence of intoxicating liquors that he was incapable of exercising ordinary care, and that he did so fail, and that such
216 failure was the direct and proximate cause of the injury, they would find for the defendant.

Forty-seventh Assignment of Error.

The court erred in instructing the jury, in paragraph No. 4 of its charge, that it was the duty of the engineer and fireman, while approaching the crossing to keep "a lookout to discover persons upon or about to enter upon the said crossing that a man of ordinary prudence would have done under the same circumstances," and that if they failed to keep such lookout and such failure was the proximate cause of the injury, that they should find for the plaintiffs, and in refusing to give in connection therewith special charge No. 1 asked by the defendant, to the effect that an engineer who sees persons or teams approaching or waiting to pass over a crossing is not bound to anticipate that such persons will undertake to pass in advance of the approaching train; and in failing to give special charge No. 10 asked by defendant, to the effect that if the servants of the defendant in charge of the train saw the wagon in which deceased was riding stop before reaching the crossing, and that it reasonably appeared to them, acting with reasonable care, that such wagon would make no attempt to pass the crossing until after the train passed, then it was not negligence for such servants not to stop the train; and in failing to give special charge

No. 23 asked by defendant, that the lookout of those in control of the engine should be confined to defendant's track; and in failing to give special charge No. 22 asked by defendant, that if the appearance of the deceased on the track was so unexpected that it left defendant's agents no time to stop the train, they would find for the defendant; and in failing to give special charge No. 20 asked by the defendant, to the effect that if the evidence shows that deceased was off the track and out of reach of the train when he came in view of those in charge of the train, and went upon the track after the train had approached so near that it could not be stopped with ordinary care, that then plaintiff could not recover; and in refusing to give charge No. 28, to the effect that the duty of those in charge of the defendant's train did not require them to
217 assume that persons approaching the crossing would undertake to cross the same in advance of an approaching train, but that they had the right to assume that such parties would stop before undertaking the crossing and allow the train to pass, and that if they believed that at the time the fireman, J. W. Slocumb, saw deceased and his companions they had stopped at the foot of the approach to the crossing, he had the right to assume that they intended to permit the train to pass, and that if the jury believed that thereafter deceased and his companions whipped the horses upon the track immediately in front of the engine and in such close proximity thereto that defendant's servants could not see the same in time to prevent the injury, that then they should find for the defendant. The charge of the court therefore instructed the jury that if they failed to keep a lookout defendant was liable, and wholly failed, though specially requested, to explain in any manner whatsoever in what a proper lookout consisted, and left the jury wholly without guidance to respond to the argument made by plaintiffs' counsel, that it was their duty to have seen the deceased and his companions as they approached the right of way and before they were in peril and stopped the train at such time, and have thereby avoided the injury.

Forty-eighth Assignment of Error.

The court erred in its charge to the jury in submitting to the jury the issue as to whether the defendant was negligent in permitting the switch-engine to stand near the crossing emitting steam, which frightened the team by which deceased was drawn, thereby delaying the passage over the crossing, and failing to charge in connection therewith the law, as asked by defendant in special charge No. 29, that if deceased by the use of ordinary care could have seen such switch-engine, and nevertheless approached in such close proximity thereto that the team was frightened, and he for this reason failed to look for an approaching train, and that by reason thereof the injury occurred, they would find for the defendant.

218 *Forty-ninth Assignment of Error.*

The court erred in paragraph 7 of its charge to the jury, which is as follows: "In case you should find a verdict for the plaintiffs you

will assess the damages at such — as under the evidence will compensate them for the pecuniary loss, if any, sustained by the death of the said James Ferris, and you will apportion the damages—that is, state how much each will receive"—said charge being erroneous in this, that it permits the jury to ascertain what sums of money would have probably been received by the plaintiffs from the earnings of the deceased, and that the aggregate of these sums must be taken as the measure of damages, such verdict giving in advance the aggregate of the sums of money which would have been received by the plaintiffs during an ordinary lifetime. This is not the correct measure of damages, the law being that a jury should give such damages as they think proportioned to the injury sustained.

Fiftieth Assignment of Error.

The verdict is grossly excessive and was occasioned by the continued appeals of counsel for plaintiffs to the passions and prejudices of the jury, such appeals being continued throughout the entire trial, and while rebuked continually by the court were continuously persisted in with the evident purpose of inflaming the passions of the jury, and which did inflame them until they rendered a verdict grossly excessive in amount and proportioned rather to the number of the plaintiffs than to the injury sustained.

Fifty-first Assignment of Error.

The court erred in charging the jury, in paragraph 4 of its charge to the jury, as follows: "Or if you believe from the preponderance of the evidence that said employees, who were charged with that duty, did not sound the whistle on the engine drawing the said train at a distance of at least 80 rods from the crossing, and did not begin to ring the bell thereon at that point and continue to ring the same until said crossing was passed, and that such failure to sound the whistle and ring the bell, if there was such, was the direct and proximate cause of the striking of the wagon and killing of the deceased, you will find a verdict for the plaintiffs;" and in refusing
219 to charge the jury, as asked by the defendant in charge No. 8, refused by the court, that if they believe that the whistle was sounded more than 80 rods distant from the crossing, but at such distance beyond that it could well have been heard at the crossing by a man of ordinary good hearing, this would be a compliance with the law with regard to the blowing of the whistle.

Fifty-second Assignment of Error.

The court erred in charging upon the issue of the failure of the engineer and fireman to keep a proper lookout, there being no evidence that they or either of them failed to keep a proper lookout.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY OF TEXAS,
By ORGAIN & GARWOOD, *Attorneys.*

Filed July 25, 1899.
R. J. GRIESENBECK, *Clerk.*
21—349

Bill of Costs, Aug. 25, 1899.

Clerk's fees:

Docketing cause.....	$ .20
Citation issued.....	.75
Copy of citation.....	.25
Entering return on citation.....	.50
" appearance.....	.45
Filing 119 papers.....	11.90
Issuing 18 subpœnas for 116 witnesses.....	19.35
" commission to take deposition	.75
" certified copy of interrogatories.....	2.50
To one revenue stamp.....	.10
" endeavoring to take the deposition- of Sam. and Frank Ferris.....	4.00
220 To swearing and empanneling jury.....	.35
" " 76 witnesses	7.60
To receiving and recording verdict of jury	.35
" taking 41 affidavits	10.25
" entering 4 orders	3.00
" " judgment.....	1.50
" taking appeal bond	1.50
" making transcript on appeal	88.35
" taxing costs.....	.25
Total clerk's costs.....	$153.90

Sheriff's fees:

Serving citation	.75
Jury fee.....	.50
To summoning 70 witnesses.....	35.00
" mileage on same.....	21.00
Total sheriff's costs	$57.25

Constable's fees:

To summoning 29 witnesses.....	$14.50
" mileage on same.....	.60
Total constable's fees.....	$15.10
" county jury fee	5.00
" witness fees claimed.....	185.00
" notary's fees for taking depositions.....	21.00

Recapitulation.

To total clerk's fees	$153.90
" " sheriff's fees.....	57.25
" " constable's fees.....	15.10
" county jury fee.....	5.00
" total witness fees claimed	185.00
" " notary's fees, taking depositions.....	21.00
" " amount of costs to date.....	$437.25

221 *Certificate of Clerk, Aug. 25, 1899.*

THE STATE OF TEXAS, }
County of Bastrop. }

I, R. J. Griesenbeck, clerk of the district court in and for said county and State, do hereby certify that the above and foregoing is a true and correct transcript of all the proceedings had and papers filed in cause No. 1884, wherein Mrs. Mollie F. Ferris and others are plaintiffs and The Missouri, Kansas and Texas Railway Company of Texas is defendant, together with a true and correct copy of the bill of costs in said cause.

Given under my hand and the seal of said court, at office
[SEAL.] in Bastrop, this the 25th day of August, A. D. 1899.

R. J. GRIESENBECK,
Clerk District Court, Bastrop County, Texas.

Endorsed: No. 2356. The M., K. & T. R'y Co. of Texas, appellant, *vs.* Mrs. Mollie F. Ferris *et al.*, appellees. From the district court of Bastrop county. Applied for by Orgain & Garwood, attorneys for appellant, on the 25th day of July, 1899, and delivered to H. M. Garwood on the 25th day of August, 1899. R. J. Griesenbeck, clerk district court, Bastrop county, Texas. Filed in court of civil appeals, at Austin, Texas, the 12th day of October, 1899. R. H. Connerly, clerk court of civil appeals, 3rd supreme judicial district of Texas.

222 *Judgment of the Court of Civil Appeals.*

Rendered March 21st, 1900.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS }
vs. }
MRS. MOLLIE F. FERRIS ET AL. }

Appeal from district court of Bastrop county.

Opinion by Associate Justice Key.

This cause came on to be heard on the transcript of the record, and, the same being inspected, because it was the opinion of the court that there was no error in the judgment, it is therefore considered, adjudged, and ordered that the judgment of the court below be in all things affirmed; that the appellees, Mollie F. Ferris, Mattie Lee, Sam. Richard Ferris, Price Franklin Ferris, Mina Kattie Ferris, Millie Caldona Ferris, Henry Cordell Ferris, Dovie Emeline Ferris, and Lovie Eveline Ferris, do have and recover of and from the appellant, The Missouri, Kansas & Texas Railway Company of Texas, principal, and its sureties, T. J. Trigg and T. C. Osborn, the respective amounts adjudged to them by the court below and all costs in this behalf expended, and this decision be certified below for observance.

Opinion of the Court of Civil Appeals.

Delivered March 21st, 1900.

MISSOURI, KANSAS & TEXAS R'Y CO. OF TEXAS, Appellant,
vs.
MRS. MOLLIE F. FERRIS ET AL., Appellees. } No. 2356.

Appeal from the district court of Bastrop county.

223 *Opinion.*

On the afternoon of January 28th, 1899, James Ferris, Cass Ferris, and William Ashley started home from the town of Smithville in a wagon, and while attempting to cross the railroad track at a public crossing a passenger train collided with the wagon and team, killing James Ferris and William Ashley and seriously injuring Cass Ferris. Thereafter the surviving wife and children of James Ferris brought this action against the railroad company to recover damages on account of his death, charging the defendant with negligence (1) in failing to ring the bell and blow the whistle upon approaching the crossing, as required by statute; (2) running the train at an excessive rate of speed; (3) permitting a switch-engine, from which steam and smoke were escaping, to remain near the crossing, frightening the team, etc.; (4) that the crossing was steep, narrow, and dangerous and the view of the track obstructed by bushes upon and adjacent to the right of way, and (5) that the employés operating the train discovered the peril to which the deceased and his associates in the wagon were exposed and failed to use proper care to prevent the collision.

The defendant, after entering a general denial, interposed pleas of contributory negligence, 1st, on the part of James Ferris himself and, 2nd, on the part of his companions, accompanied by averments that they were all engaged in a common enterprise, and the negligence of of his companions was imputable to him.

There was a jury trial, resulting in a verdict and judgment for the plaintiffs for $10,000, and the defendant has appealed.

Necessarily the verdict involves findings of fact to the effect that the employés operating the train on the occasion in question were guilty of negligence in one or more of the particulars alleged, and that James Ferris and his companions in the wagon were not guilty of contributory negligence, and that by reason of the death of James Ferris the plaintiffs have sustained pecuniary loss in the several amounts awarded to them by the verdict, aggregating $10,000.00.

224 Counsel for appellant vigorously assail the verdict, especially on the issues of negligence and contributory negligence, as contrary to and not supported by the evidence.

We have given these questions careful consideration, and while, in so far as the record reflects the proceedings in the court below, it

seems to us that the preponderance of testimony is against the verdict, especially on the issue of contributory negligence, still there is testimony in the record that will support the verdict. It is true that much of this testimony comes from interested witnesses, but there is evidence from other sources tending to show negligence as to the speed of the train and the failure to blow the whistle and ring the bell.

The jury were the judges of the credibility of the witnesses, and if they chose to give credence to the testimony of interested witnesses in preference to that of those not interested, they had the right to do so. The witnesses appeared before the jury, who observed their demeanor on the witness stand and their manner of testifying, and in this way may have obtained valuable assistance in determining their credibility, which, in the nature of things, cannot be and is not reflected by the transcript. Hence we overrule the assignments referred to and hold that the finding of negligence against appellant and of non-negligence on the part of James Ferris and his associates is supported by testimony.

Nor can we say that the verdict is so excessive as to require it to be set aside on appeal. It is a large verdict, but it is not so extremely large as to justify the conclusion that the jury were actuated by improper motives.

In charging on contributory negligence the court used the expression "failed to look and listen," and it is contended on behalf of appellant that the charge should have read "failed to look or listen."

Under the assignments raising this question appellant submits the following proposition: "Where the evidence tends to show that by the use of either of the senses of sight or hearing the approaching train might have been discovered in time to prevent the accident, the failure to use either sense is negligence, and to charge that there must be a failure both to look and to listen before there can be negligence is material error."

The correctness of this proposition is not disputed, but the charge of the court did not go to that extent. It did not declare that there must be a failure both to look and to listen before there can be contributory negligence. It told the jury that if there was a failure to look and listen, and under the circumstances a person of ordinary prudence would have done so, such failure to look and listen would constitute negligence, and so it would; but the charge did not state that the failure to do one of these things only would not also constitute negligence. In other words, there is no positive error in the charge, although it would have been more complete if it had been in the disjunctive as well as the conjunctive, so as to make it read, "failed to look and listen or to do either," etc., as doubtless was intended by the court.

Furthermore, appellant is not in a position to complain of the charge in this respect, because it requested a special instruction couched in the same language. The requested charge was refused; but, having asked the court to charge as it did, appellant will not be permitted to complain of the charge (Railway *vs.* Sein, 89 Tex., 63).

Objection is urged against the charge of the court because it failed to submit to the jury the question of contributory negligence, predicated upon the failure of James Ferris and his associates to stop the wagon before going upon the track. Though the pleadings and evidence made this an issue in the case, it was not reversible error for the court to omit to charge upon it in the absence of a properly prepared requested instruction (R'y Co. *vs.* Eberhart, 91 Tex., 324). On this subject appellant asked the following charge, which was refused:

"It is the duty of one approaching the railroad crossing to exercise the care and prudence that a man of ordinary care would exercise under the same circumstances, and if you should believe that in the exercise of such care it was the duty of James Ferris to have
226 stopped before driving upon said railway, and that he failed to do so, or if you should find that in the exercise of such care it was his duty to look and listen for an approaching train, and that he failed to do so, and you should find that under all the circumstances he was negligent, and that such negligence contributed to the injury complained of, you will return a verdict in favor of the defendant."

This charge was properly refused, because there was one ground upon which the plaintiffs sought a recovery, and which there was testimony tending to support, which was not affected by the contributory negligence of James Ferris and his associates, if such negligence was shown. If the occupants of the wagon, although guilty of contributory negligence, were discovered by either of the employés operating the train to be in a situation of imminent peril, as the testimony tends to show, then it was their duty to use the greatest precaution to avoid the collision, although the occupants of the wagon may have been guilty of negligence in placing themselves in that position, and the failure of those operating the train to use the degree of care referred to under the circumstances stated would entitle plaintiffs to recover, notwithstanding the previous negligence of James Ferris and his associates (Sanches *vs.* R'y Co., 88 Tex., 117). Therefore the requested instruction was properly refused (City of Dallas *vs.* Jones, 53 S. W., 379).

For this latter reason, if for no other, we think the court properly refused all the instructions requested upon the subject of contributory negligence. The evidence raised the issue of the occupants of the wagon being discovered in a position of imminent peril and the duty of appellant to exercise all reasonable care to avoid injuring them, notwithstanding their own contributory negligence, and none of the requested instructions submitted by appellant conformed to this theory. It is true the court did not submit this latter phase of the case to the jury, although appellees requested a charge applicable thereto. However, the failure of the court to affirmatively submit to the jury this theory of the case did not warrant appel-
227 lant in ignoring it in the preparation of requested instructions. These instructions should have conformed to the case made by the pleadings and evidence, regardless of what may have been omitted from the general charge given by the court.

There are other questions presented in the briefs which we deem it unnecessary to discuss in this opinion. We have duly considered them all and have reached the conclusion that no reversible error has been shown.

Judgment affirmed.

KEY,
Associate Justice.

(Endorsed:) No. 2356. M., K. & T. R'y Co. of Texas, appellant, *vs.* Mrs. Mollie F. Ferris *et al.*, appellees. Appeal from Bastrop county. Opinion. Affirmed. Key, associate justice. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, Mar. 21, 1900. R. H. Connerly, clerk. Filed in supreme court May 15, 1900. Chas. S. Morse, clerk.

Motion for Rehearing.

Filed March 31st, 1900.

In the Court of Civil Appeals for the Third Judicial District of Texas.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY of Texas, Appellant,
vs.
MOLLIE F. FERRIS ET AL., Appellees.
No. 2356.

Appeal from Bastrop county, Texas.

Motion for rehearing.

To the honorable court of civil appeals for the third supreme judicial district:

Herein comes The Missouri, Kansas and Texas Railway Company of Texas, appellant, and moves the court that the judgment herein rendered on the 22nd day of April, 1900, be set aside and held for naught, a rehearing granted, and the judgment of the district court of Bastrop county, Texas, be reversed, and this cause be remanded to said trial court for trial, and for cause says:

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1. The court erred in overruling appellant's ninth assignment of error, which is as follows: "The court erred in refusing to give charge No. 3 asked by defendant, as follows: 'It is the duty of one approaching the railroad crossing to exercise the care and prudence that a man of ordinary care would exercise under the same circumstances, and if you should believe that in the exercise of such care it was the duty of James Ferris to have stopped before driving upon said railway, and that he failed to do so, or if you should find that in the exercise of such care it was his duty to look and listen for an approaching train, and that he failed to do so, and you should find that under all the circumstances he was negligent, and that such negligence contributed to the injury complained of, you will return a verdict in favor of the defendant.'"

2. The court erred in overruling appellant's tenth assignment of error, which is as follows: "The court erred in paragraph 5 of its charge to the jury in failing to charge that if the jury believed that under all the circumstances of the case an ordinarily prudent man would have stopped before approaching the crossing, and that defendant failed in this respect, and that such failure contributed to the injury complained of, they should find for the defendant, the court thereby eliminating the failure of deceased to stop, if he did so fail, from the case as proof of negligence."

3. The court erred in overruling appellant's eleventh assignment of error, which is as follows: "The court erred in paragraph 6 of its charge to the jury, wherein he instructed the jury as to what negligence of Cass Ferris and Wm. Ashley would be imputable to deceased, James Ferris, in this, that in said paragraph he eliminated from the consideration of the jury the failure of said parties or either of them to stop as an element of negligence herein, the proof tending to show that they failed to stop, and that under the circumstances of this case such failure was negligence."

229 *Argument under Three Preceding Assignments.*

The court admits that the pleadings and the evidence raise the issue that if deceased failed to stop before going upon the crossing that this was negligence contributing to his injury. The court admits that "the preponderance of the testimony, especially upon the issue of contributory negligence, is against the verdict." No objection is made to the form of the charge asked. It may be taken, therefore, as admitted that it correctly states the law. It calls attention to the fact that the trial judge has not submitted to the jury an issue which this court admits was raised both by the pleadings and the evidence. Not only is a pertinent charge asked, but error is assigned upon the failure of the trial court to submit an issue conceded to be material on the state of the evidence in this case. If the charge asked had been defective, it is yet sufficient to call the attention of the trial court to the issue and to make it error for it to refuse to submit the issue (Cleveland *vs.* Empire Mills *et al.*, 25 S. W., 1055).

The refusal of the court below to submit this issue and to give the charge requested is justified, upon the ground that there was not coupled with it another proposition that this court conceives to have been raised by the evidence, to wit, that notwithstanding deceased may have been guilty of contributory negligence, yet if the agents of appellant discovered his imminent peril and failed thereupon to use the means at their command to avert the injury, appellant would be liable. Now, the trial court justly held that there was no evidence in the record justifying the submission of such theory. Whether correct or not in that holding, we believe that it has never before been held that a litigant, before he can secure the submission of a pertinent issue, must agree to the submission against him of another issue which the trial judge does not believe to be in the case. Appellant, by the opinion of this court, is placed in this position. The trial court does not believe

the issue of a failure to use care after discovery of imminent peril is in the case and refuses to submit such issue.
230 In this position we thought then, as we think now, that he was clearly correct. To secure a proper charge upon a material issue raised by the pleadings and by the evidence, this court would compel appellant to say to the trial court, in effect: "You have declined to submit the issue of lack of care after discovery of imminent danger. In this we believe you are correct. You have held there is no such issue in the case. In order, however, to secure the submission of another issue raised by the pleadings and sustained by the evidence we are compelled to agree that the first proposition should be submitted and abandon a proposition in which we have been sustained by the court." If the trial court adheres to its opinion that the issue of lack of care, after imminent peril discovered, is not in the case, it will, of course, decline to give a proper charge on a pertinent issue because it is coupled with an issue not raised by the evidence. In order, then, to secure this charge on a pertinent issue we are required to barter away our rights and agree to the submission of a foreign issue. This is utterly subversive of the philosophy of a trial at law. It is confidently believed that no authority can be found for such a holding. The defendant must contest the case presented to him for contest. The case submitted against it by pleadings, evidence, and charge of the court does not present the theory that the servants of the appellant saw the imminent peril of deceased, and after such discovery failed to use proper precaution to avert the injury. A defendant fights a case as made. The issue mentioned was disposed of when the trial court refused to charge upon it. To the case it was contesting before the jury the negligence of deceased in failing to stop, if it was negligence contributing to the injury, was a complete bar, and to present that issue to the jury it was not necessary for the defendant to ask the court to charge also upon an issue which it had already determined should not be submitted. To the contrary, it was proper for the defendant to assume that inasmuch as the court had declined to submit the issue after request by the plaintiff, that it would refuse any charge containing such issue as matter for submission to the jury. This court by the rule an-
231 nounced punishes a defendant for not asking the submission against it of an issue which the trial court had already decided should not be submitted. If the court in its charge had submitted such issue, and there had been evidence to sustain it, then the contributory negligence set up in the assignments would not have been a complete bar, and the charge asked to meet the case made should have contained the qualification to be a perfect charge. The case, however, was not tried upon that theory, and it is conceived that a defendant should not be called upon to combat a case which the plaintiff ought to have made, and that his requested charges should be so framed as to meet issues which are not in the case, but which, in the opinion of the appellate tribunal, ought to have been in it. The case cited by the court (City of Dallas *vs.* Jones, 53 S. W., 379) does not support the position taken. In that case

there were two counts of negligence—negligent construction of the sidewalk and failure to repair. The charge of the court submits both issues, and the charge requested wholly ignores one and instructed the jury to find for the defendant, unless it believes that there was a failure to repair and notice to the city, thereby withdrawing the other issue. The court holds that the general charge covers both issues, and to refuse the special charge was not error. In the case at bar the trial court had withdrawn from the jury the very issue which this court holds, that appellant should submit as a condition precedent to the submission of a defensive issue raised by pleading and sustained by evidence. The injury inflicted by this refusal to submit our defense is accentuated by the fact that the trial judge submits, with painful accuracy of detail, every act relied upon by plaintiffs as constituting negligence (except the one which this court holds that defendant should have submitted). The charge, where it deals with the defensive matter, is general, abstract, and colorless, nowhere applying the law to the facts or affirmatively presenting the defenses pleaded; and this court holds that we are not entitled to such presentation and have forfeited our rights thereto because we were unwilling to attach to every requested charge
232 a proviso submitting against ourselves an issue already held not to be in the case. In addition to this, we submit that there is absolutely no evidence in the case that after defendant's servants had discovered the imminent peril of deceased they failed to use proper care to avert the injury. To the contrary, the evidence absolutely negatives such idea. The engineer did not and could not see them, and when the fireman saw them they were in a place of safety, where they could plainly see the approaching train, and that he never saw them again until they urged the horses unto the track immediately in front of the approaching train.

It is therefore submitted:

1. That if, as conceded by the court, there was evidence supporting the issue raised by the charge asked, it was error for the trial court to refuse the charge upon such issue, even though its action was invoked by a defective charge.

2. The charge requested presented a complete defense to the case submitted to the jury against it in the court's charge, and it is not required in passing upon the correctness of the defensive charge for the defendant to consider an issue not submitted by the court.

3. There is no evidence upon this issue and the trial court could not properly submit it.

Earnestly believing that the court is fundamentally wrong in the position taken, we ask it to reconsider its opinion, and believe that when it has done so a different result will be reached and the assignments of error sustained.

4. The court erred in overruling and failing to sustain appellant's twelfth assignment of error, which is as follows: "The court erred in failing and refusing to give charge No. 8 asked by defendant, as follows: 'It was the duty of defendant's employés operating the engine which came in contact with the wagon in which deceased, James Ferris, was riding to give signals of its approach by ringing

the bell and blowing the whistle at the distance of at least eighty rods from the crossing where the collision occurred. The objects of these requirements is to protect travelers on the highway approaching the crossing, and it is not required that these signals
233 should be given at exactly eighty rods, and if you believe in this case that the whistle of defendant's engine was sounded at more than eighty rods from the crossing, but at such distance beyond that it could well have been heard at such crossing by a man of ordinarily good hearing, this would be a compliance with the law with regard to the blowing of such whistle.'"

5. The court erred in overruling and failing to sustain appellant's thirteenth assignment of error, which is as follows: "The court erred in paragraph No. 5 of its charge to the jury, which is as follows: 'If, however, you believe from the preponderance of the evidence that the said James Ferris in approaching said crossing failed to look and listen for an approaching train and you believe that a man of ordinary prudence would have looked and listened under the circumstances for a train before entering upon said crossing and railway, and that his failure to look and listen directly and proximately contributed to the striking of the wagon and his death, you will find a verdict in favor of the defendant, and this, too, though you may believe that the defendant did not use ordinary care in running its train up to and over said crossing,' said charge of the court being erroneous in this, that it distinctly instructs the jury that before they can find that James Ferris was negligent they must believe from the preponderance of the testimony that he must both fail to look and fail to listen, whereas the law is that if he either fails to look or fails to listen, and such failure contributed directly to his injury, he would in either event be guilty of contributory negligence, precluding his recovery, and the evidence herein strongly presenting both issues. The court therefore instructs the jury that before they could believe James Ferris guilty of negligence they must believe that he failed to use both his sense of sight and his sense of hearing, the law being that if one approaching a railway crossing fails to use either his sense of sight or his sense of hearing, and by the use of either sense he could have discovered the approach of the train and avoided the danger, he cannot recover."

234 6. The court erred in overruling and failing to sustain appellant's fourteenth assignment of error, which is as follows: "The court erred in paragraph 6 of its charge to the jury, wherein, in charging upon the negligence of Cass Ferris and Wm. Ashley and in instructing the jury as to the circumstances under which the negligence of such parties would be imputed to the deceased, James Ferris, he repeatedly and continuously charged the jury that in order to believe that the said Ferris or William Ashley were guilty of negligence, they must believe from the preponderance of the testimony that they and each of them both failed to look and failed to listen, whereas the law is that if such parties either failed to look or failed to listen for an approaching train, when by the use of either sense they could have discovered the approaching train, such persons

would be guilty of such negligence as that, if same was imputable to James Ferris, neither he nor his heirs could recover."

7. The court erred in overruling and failing to sustain appellant's fifteenth assignment of error, which is as follows: "The court erred in paragraphs 5 and 6 of its charge to the jury, wherein it instructs the jury, as above set out, that before they can find the deceased, James Ferris, guilty of contributory negligence, precluding a recovery by his heirs, they must believe that he both failed to look and failed to listen before approaching the crossing, and in refusing to give special charges Nos. 4, 6, 16, 24*a*, and 25, in each of which charges the jury is instructed that a failure to look or a failure to listen, if under all the circumstances negligence and contributing to the injury, will preclude a recovery."

8. The court erred in overruling and failing to sustain appellant's sixteenth assignment of error, which is as follows: "The court erred in failing and refusing to give charge No. 12 asked by defendant, as follows: 'If you believe that at the time and place of the accident the said James Ferris was so far under the influence of intoxicating liquors as to be unable to exercise ordinary care in passing such crossing, and that at such time he did fail to use ordinary care, and such failure to use ordinary care contributed proximately to his injury, you will in that event find for the
235 defendant, even though you should believe that its servants were at the time and place negligent, and that such negligence contributed to the injury of said Jim Ferris.'"

9. The court erred in overruling and failing to sustain appellant's seventeenth assignment of error, which is as follows: "The court erred in failing to give charge No. 13 asked by the defendant, as follows: 'If you believe that Cass Ferris and Wm. Ashley or either of them, in approaching said crossing, failed to act with ordinary care and prudence, and that under all the circumstances they or either of them failed to act with the care and prudence which a man of ordinary care and prudence would use under the circumstances, and that such failure was the sole cause of the accident, you will find in favor of the defendant.'"

10. The court erred in overruling and failing to sustain appellant's eighteenth assignment of error, which is as follows: "The court erred in its charge to the jury in wholly failing and refusing to attempt to apply the law of contributory negligence to the facts of this particular case and in failing and refusing to give charge No. 6, requested by defendant for the purpose of obviating said defect, as follows: 'The defendant railway company in this case, in addition to the general denial, by which it denies that it has been guilty of negligence in any of the particulars charged by plaintiffs, or that such negligence, if any, was the cause of the injury complained of, pleads that the deceased, James Ferris, was himself negligent, and that his said negligence contributed directly and proximately to his injury. This is known in law as the defense of contributory negligence, under which you are instructed that even though you should believe that on the occasion herein inquired about the servants and agents of defendant company were negligent, and that

such negligence contributed to the injury of said James Ferris, yet if you further believe that the said James Ferris was also negligent, and that his negligence contributed to and co-operated with the negligence of defendant's servants in producing the injury, in that event plaintiffs cannot recover; in other words, if both par-
236 ties are negligent and the negligence of each proximately contributes to the injury, there can be no recovery; hence in this case, although you might believe at the time of the collision the agents of the defendant were propelling the train at a rate of speed at the time and place of the accident *James Ferris was so far under the influence of intoxicating liquor* as to be greater than a prudent man would have done under all the circumstances, or that they failed to ring the bell or blow the whistle as required by statute, or failed to use ordinary care in any of the particulars set out in the charge hereinbefore given you, or that such agents were guilty of all said acts and omissions, and that under all the facts and circumstances of the case they were negligent, and that such negligence directly contributed to the injury of said James Ferris, yet if you further believe that the said James Ferris was familiar with the said crossing and its approaches; that he knew that this particular train was due at said crossing at or about the time it did reach there; that at the time he was so far under the influence of intoxicating liquors as to be incapable of prudent action; that at the time *he* approached said crossing Cass Ferris and Wm. Ashley were under the influence of liquor to such an extent as to render them unable to prudently drive and direct a team and wagon, and that deceased, James Ferris, knew this at the time he embarked in said wagon; that said wagon was open and without cover; that deceased had a clear, plain, and unobstructed view of defendant's track at said crossing and for a long distance to the north thereof and to the south thereof, for a long distance before he reached said crossing, and that there was nothing to obstruct his view of an approaching train, and that by the use of ordinary care he could have seen or heard said train approaching from the north; that he did not look or listen to ascertain whether a train was approaching, or that if he did see such train approaching the crossing he endeavored to cross in advance thereof, and that if you believe that under all the facts and evidence, taken together, that the deceased, James Ferris, in attempting to pass over said crossing in advance of the approaching engine, failed to act with the ordinary and reasonable care
237 and prudence of an ordinary prudent and careful man under the same circumstances, and that such failure to act with ordinary care proximately contributed to the injury of said James Ferris, then, in that event, you will find a verdict in favor of defendant."

11. The court erred in failing and refusing to sustain appellant's nineteenth assignment of error, which is as follows: "The court erred in failing to give charge No. 24b asked by defendant, as follows: 'Defendant company in this case, in addition to the general denial, by which it denies that it has been guilty of any negligence in the particulars charged by plaintiff, or that such negligence, if

any, was the cause of the injury complained of, pleads that the deceased, James Ferris, was himself negligent, and that those in the wagon with him were negligent in such manner as is imputable to him, and that such negligence contributed directly and proximately to his injury. This is what is known in law as contributory negligence, under which you are instructed that even though you believe that on the occasion herein inquired about the servants and agents of the defendant were negligent, and that such negligence contributed to the injury of James Ferris, you will, if you further believe that James Ferris was also negligent, or that Cass Ferris or Wm. Ashley, or either of them, were negligent under such circumstances as that their negligence would be imputable to James Ferris under the charge hereinbefore given you, and that such negligence contributed to and co-operated with the negligence of defendant's servants in producing the injury complained of, in that event plaintiffs could not recover. In other words, if both parties were negligent and the negligence of each contributed to the injury, there can be no recovery; hence in this case, although you might believe that the servants of defendant failed to ring the engine bell or blow the whistle, as required by statute, or failed to keep a proper lookout, or that they were propelling said train at a greater rate of speed than would have been used by men of ordinary care, or that they were negligent in any of the particulars hereinbefore given you in charge, and that such negligence directly contributed to the injury of said James Ferris, yet you are instructed
238 that if you further believe that the said James Ferris was familiar with the crossing and its approaches; that he knew that this particular train was due at said crossing at or about the time it did reach there; that at the time of the collision he was so far under the influence of intoxicating liquors as to be incapable of prudent action, and that at the time they approached said crossing Cass Ferris and Wm. Ashley were under the influence of liquor to such an extent as to render them unable to prudently drive, direct, and control the team on and over said crossing, and that deceased, James Ferris, knew this at the time he embarked in the wagon, and that said wagon was open, without covering, and that each of the occupants thereof had a clear and unobstructed view of defendant's track at said crossing and for a long distance to the north thereof, as well as to the south, before reaching said crossing and the approach thereto and at the same, and that there was nothing to obstruct his view of the approaching train, and that by the use of ordinary care he could have seen or heard said train approaching from the north, and that he did not look or listen to ascertain whether or not a train was approaching, and that if he did see said train he attempted to cross in advance thereof when it was at such distance from the crossing that a man of ordinary prudence would not have undertaken to make the crossing in front of it, and that if you believe that under all the facts and evidence, taken together, that the deceased, James Ferris, in attempting to cross over said crossing at the time and in the manner and under the circumstances developed in the evidence failed to act with that ordinary and reasonable care and

prudence which would characterize the action of an ordinarily prudent and careful man under the same circumstances, and that such failure to act with ordinary care proximately contributed to his injury, then, in that event, you will find a verdict in favor of defendant.'"

12. The court erred in overruling and failing to sustain appellant's twentieth assignment of error, which is as follows: "The court erred in refusing to give charge No. 9 asked by defendant, as follows:

'If you believe from the evidence that James Ferris and
239 his companions or either of them saw the approaching train and stopped to permit it to pass by, and that thereafter Cass Ferris and Wm. Ashley, without fault of James Ferris, after seeing such train approaching and without ordinary care, urged the horses upon the track in front of the train, and that under all the circumstances the parties so urging the horses upon the track were negligent, and that such negligence contributed to the injury; and if you believe that the parties so urging said horses on the track in advance of the approaching train did so because under the influence of intoxicating liquor, and was then and there incapable of directing and controlling a team and wagon as a man of ordinary care and prudence would, and that the said James Ferris knew such fact before taking passage on such wagon, and voluntarily approached the crossing in charge of one of his companions in such condition, then and in that event the negligence of said Cass Ferris and Wm. Ashley would be imputable to said James Ferris, and you will find a verdict in favor of defendant, even though you should believe defendant's agents were also negligent.'"

13. The court erred in failing to sustain and in overruling appellant's twenty-ninth assignment of error, which is as follows: "The court erred in failing to give charge No. 29, asked by defendant, as follows: 'Although you should believe from the evidence that the team of Cass Ferris became frightened; that it engaged the attention of Cass Ferris and the deceased, and if you should further believe that the said — was caused by a switch-engine standing near the crossing and emitting steam, yet if you further believe that the deceased saw or by the use of ordinary care could have seen such switch-engine, and that they nevertheless undertook to pass in close proximity to said engine, and that thereby such animal became frightened, and so drew their attention that they failed to notice or listen for the approaching train, and that by reason of such failure the injury occurred, then in that event the fact that the animal became frightened will not excuse them from exercising ordi-
240 nary care to watch for and listen for an approaching train, and if they did so fail and such failure was the cause of the accident, you will find for the defendant.'"

Argument.

It can scarcely be denied that this charge presents a correct proposition of law upon a material issue supported by the evidence. Appellees contend that we were negligent in leaving a switch-engine,

which was emitting steam, near a narrow crossing. They seek to excuse the negligence of the deceased in not seeing or hearing the approaching train upon the theory that by reason of such negligence the team became frightened and so engaged his attention that he did not see or hear the approaching train. Now, it is admitted, 1, that the parties saw this engine emitting steam before they reached the approach to the crossing; 2, that they were familiar with the nature and character of the crossing; 3, that they knew that this particular train was due at this particular time; 4, that they knew that one of the team was scary. If, then, deceased deliberately and voluntarily placed himself in a perilous position, it must be the law that he cannot plead the peril thus voluntarily encountered as an excuse for his own lack of care. The presence of the engine near the crossing is about the only allegation in plaintiffs' petition sustained by the evidence. It is submitted as an element of negligence in the charge of the court. Why should not defendant's theory be submitted? Unless this charge falls under the ban of condemnation urged against us, that we did not ask the trial court to submit against us an issue which he had already determined was not a proper issue to be submitted, it is a correct charge upon a most important issue. The case goes to the jury upon the proposition that the presence of the engine placed the deceased in such peril that he was excused from the exercise of ordinary care. In this attitude of the pleadings, evidence, and charge, we ask the court to charge the jury that if deceased deliberately and knowingly assumed such peril, that it will not excuse him from looking and listening. This was necessary, that the jury might understand defendant's rights, and we cannot believe that in order to
241 secure this right we were compelled to surrender the right secured from the court when he declined to charge that the defense of contributory negligence did not avail if those in charge of the engine discovered the peril of deceased in time to have prevented the injury and failed to do so. We thus return again to the fundamental error in the court's conception of the case. The trial court wholly failed in its charge to submit the defenses of appellant. Every element of negligence pleaded by the plaintiff save one is carefully, accurately, and with particularity of detail submitted against it. This one theory the trial court did not think was raised by the testimony and declined to submit it. Now, it is held that before we can get a single charge on the defenses to the acts of negligence submitted we must come in, admit that the trial court was wrong in excluding the issue, and virtually ask the court to submit it ourselves. This compels the defendant to become the guardian of plaintiffs' rights, and compels him, before he can in any manner whatsoever protect himself, see to it, at his peril, that the court has properly submitted every issue demanded by the plaintiff. Let us test this novel theory. Plaintiff sues for land. He relies for recovery—1, upon paper title direct; 2, that he has acquired title by limitation. The trial court does not believe that the second issue should be submitted, and trial is had upon first issue. Defendant asks a charge that if the jury believes a certain deed in plaintiff's

chain of title is a forgery, that then they should find for the defendant. Now, under the theory adopted by this court, if it should be found that there was evidence tending to support the issue of limitation, the defense could not secure a hearing upon the issue of the forged deed unless it also admitted that limitations should have been likewise submitted. The requested charge should then read, "If you believe that the deed was a forgery, you will find for the defendant, unless you should find that plaintiff is entitled to recover upon the issue of limitations, which the court has held is not in the case." With due deference to the court, we believe that thi
242 cannot be the law; that it is illogical; that it is a radical departure from the true theory of a jury trial, and that a defendant is required to defend against the actual case-made, not what plaintiffs ought to have made.

14. The court erred in holding as a matter of fact that there was evidence tending so show that the servants and agents of the appellant discovered the imminent peril of deceased in time to have averted the injury, and thereafter failed to use the means at their command to stop the train and avoid the collision.

15. The court erred in holding that all the charges asked by defendant upon the issues of contributory negligence were properly refused upon the ground that defendant in such charges did not recognize plaintiffs' right to recover upon the hypothesis of lack of care on part of defendant's agents after imminent peril discovered, such hypothesis not having been submitted by the court in its general charge and there being no evidence to raise such issue.

16. The court erred in failing to sustain and in overruling appellant's twenty-first assignment of error, which is as follows: "The court erred in failing to give charge No. 10 asked by defendant, as follows: 'If defendant's employés in charge of the engine saw the wagon in which deceased was riding stop before reaching the railroad, and if it reasonably appeared to them, acting with such reasonable care as would govern a man of ordinary prudence under like circumstances, that such wagon would make no attempt to cross such railroad until after such train had passed the crossing, then you are instructed that it would not be negligence for such employés not to stop such engine.'"

17. The court erred in overruling and failing to sustain appellant's twenty-second assignment of error, which is as follows: "The court erred in failing to give charge No. 17 asked by defendant, as follows: 'It is not the duty of those in charge of a railway engine to keep a lookout for parties approaching the crossing. It is their duty in approaching a railway crossing to blow the whistle and ring the bell as charged and to use reasonable care, and if any person, notwithstanding such signals and care, is discovered
243 on the track at a crossing, to use reasonable care to avoid injuring them, after such discovery, but it is not the duty of persons in charge of the engine to keep a lookout for those approaching the crossing, and a failure to do so does not constitute negligence.'"

18. The court erred in overruling and failing to sustain appel-

lant's twenty-third assignment of error, which is as follows: "The court erred in failing to give charge No. 20 asked by defendant, as follows: 'If the evidence shows that the deceased, James Ferris, was off the railroad track and out of reach of the train when the place where he was came within view of those in charge of the train, and went upon the track after the train approached so near to him that it could not be stopped by defendant's servants by the use of ordinary care and prudence, using all means used for stopping such train in time to avoid the danger, and that all such means were used at the time, then plaintiffs cannot recover, and you will return a verdict in favor of defendant.'"

19. The court erred in overruling and failing to sustain appellant's twenty-fourth assignment of error, which is as follows: "The court erred in failing to give charge No. 21 asked by the defendant, as follows: 'An inevitable accident is one that cannot be anticipated and provided against by human foresight. For such an accident there is no legal liability. If you believe that the accident herein complained of was an inevitable accident, you will find for the defendant.'"

20. The court erred in overruling and failing to sustain appellant's twenty-fifth assignment of error, which is as follows: "The court erred in failing to give charge No. 22 asked by defendant, as follows: 'If from the evidence you should believe that the appearance of James Ferris upon the track was so sudden and unexpected that it left no time to stop the train and avoid the injury, then plaintiff cannot recover, and you will find a verdict in favor of defendant.'"

21. The court erred in refusing to sustain appellant's twenty-seventh assignment of error, which is as follows: "The court erred in refusing to give charge No. 24 asked by defendant, as fol-
244 lows: 'You are instructed that while it is the duty of the servants and agents of a railway company to keep a lookout for obstructions upon its track at crossings and to use ordinary care to prevent collisions thereon, yet it is not their duty to keep a lookout to ascertain whether persons are approaching said crossing or not, and that if they saw such persons they have the right to assume that they will not undertake to drive upon the track in front of the advancing train, and it is not the duty of those operating such trains to slacken the speed or stop the train for the purpose of permitting such persons to pass over the track; hence, although you should believe that the fireman, J. W. Slocum, saw the deceased, James Ferris, and his companions approaching said crossing in a wagon, and that at said time they were at or upon the approach of said crossing, as testified to by him, then he had the right to assume that they would not undertake to go upon or over such crossing in advance of the approaching engine, and it was not the duty of such engineer and fireman to stop said train or slacken the speed thereof upon that account, and if you believe that after said engine had approached so near the crossing that the agents of the company were unable to stop the same, that deceased and his companions drove suddenly upon the track in advance of an engine and were struck, and that

under all the circumstances they failed to use ordinary care, which failure contributed proximately to the injury, you will return a verdict for the defendant.'"

22. The court erred in overruling and failing to sustain appellant's first and second assignments of error, which are as follows:

First Assignment of Error.

"Said verdict and judgment are contrary to and not supported by the evidence, in this: The evidence shows that the death of the said James Ferris was caused by his own contributory negligence, in that he approached the railroad crossing where the accident occurred, with which he was thoroughly familiar and at a time when he knew the train which struck him was due, in a state of intoxication, and that, although said crossing was so situated that for at
245 least 400 yards a person approaching the same along the route pursued by James Ferris could see at every point along said route a train approaching said crossing from the north for at least a distance of 600 yards, and although the view of said James Ferris of said approaching train was absolutely clear and unobstructed from the time said train was 600 yards distant until it reached said crossing, which plain, clear, and unobstructed view said James Ferris had at every moment during the time he was traversing the 400 yards before reaching said crossing and at the time he entered upon the same, that nevertheless he wholly failed to use either his senses of sight or hearing and wholly failed to stop or to look or to listen before entering on said crossing to ascertain whether any train was approaching, but recklessly and negligently, while under the influence of intoxicating liquors, attempted to cross said track in front of an approaching train, which he either saw, or by the use of ordinary care could have seen, approaching said crossing, and that at the time and place of the accident he wholly failed to use such ordinary care as should govern the actions of an ordinarily prudent man under the same circumstances, which negligence directly and proximately contributed to his injury."

Second Assignment of Error.

"Said verdict and judgment are contrary to and not supported by the evidence, in this: Said evidence shows that the injury complained of was caused by the negligence of Cass Ferris and William Ashley, jointly and severally, which said negligence was imputable to the said James Ferris in this, that at the time and place of the accident the said William Ashley and Cass Ferris were each under the influence of intoxicating liquors to such an extent that they were wholly unable to prudently control said team and drive said wagon or to prudently approach said crossing, all of which said James Ferris knew before taking passage with them in the wagon; that said Cass Ferris and William Ashley were each familiar with said crossing and knew that the train causing the collision was due at or about

the time of the collision; that said Cass Ferris, notwithstanding his intoxication, was attempting to drive said wagon, and said Wm. Ashley, notwithstanding his intoxication, was attempting to participate therein, all of which deceased well knew at the time he took passage in said wagon and before and at the time he undertook to pass said crossing; that the said Cass Ferris and Wm. Ashley, to whose care the deceased had thus voluntarily committed himself, wholly failed to stop or to look or to listen for an approaching train or to use either their senses of sight or hearing, notwithstanding there was no obstruction of any kind to cut off their view of such train for at least 600 yards to the north of said crossing as they entered upon the right of way and upon the approach of said crossing and for several hundred yards upon their route thither, and they, the said Cass Ferris and William Ashley, jointly and severally, failed to act with ordinary care and prudence in undertaking to pass said crossing without stopping or looking or listening for said train, or, if they did see the same, in undertaking to pass over and cross in advance thereof, which negligence proximately contributed to the injury herein complained of, and which by reason of the fact that said deceased was engaged in a joint and common enterprise with said Cass Ferris and William Ashley, and by reason of the fact that he, deceased, had committed himself to their control and carriage well knowing their incapable and intoxicated condition, was imputable to deceased, James Ferris."

Argument.

While it is not desired here to extend this motion by an argument upon the facts, it is contended that there is no conflict of evidence upon the issue of contributory negligence. Save the statement of Cass Ferris, the driver of the wagon, that he did not see or hear the approaching train, there is nothing in the record that contradicts the testimony of appellant, piled mountain high and sustained by the undisputed physical facts, that deceased drove madly into an approaching train which he could see for more than six hundred yards. It is asked that the court re-examine the record. When it is conceded that the great preponderance of the testimony is against the verdict, it goes without saying that a great injustice has
247 been perpetrated upon the defendant by the verdict and judgment rendered. We therefore, without hesitation, invoke at your hands a careful re-examination of the record upon the facts. Upon the issue of defendant's negligence there is conflict; upon the issue of contributory negligence there is none.

23. The verdict rendered against appellant in the court below, being for the sum of ten thousand dollars, is greatly excessive in amount. The trial court therefore erred in failing to grant a new trial upon that ground, and this court erred in overruling appellant's fourth assignment of error, which complains of the size of the verdict.

24. The court erred in overruling appellant's fifth assignment of error and sixth assignment of error, which complain of the verdict

of the jury in allowing Mrs. Mattie Lee, the married daughter of deceased, the sum of $250.00 damages, the said Mattie Lee being a married woman, not joined by her husband and not dependent upon her father for support, and the evidence showing that at the time her father was killed she was living with her husband and was not dependent upon her father for support. After her father's death her husband deserted her, and upon the supposition that if her father had lived and her husband did not come back he would have contributed to her support, she was allowed the sum mentioned.

25. The court erred in overruling and failing to sustain appellant's eighth assignment of error, wherein it complained of the action of the court below in refusing to take as confessed the interrogatories propounded to Sam. Ferris and Frank Ferris under the provisions of chapter 3, title 40, of the Revised Statutes, and in refusing to sustain appellant's motion that plaintiff, Sam. Ferris, be not permitted to testify touching the matters inquired about in said interrogatories, as will more fully appear from said assignment, which is as follows: "The court erred in refusing to take as confessed the interrogatories propounded to Sam. Ferris and Frank Ferris under the provisions of chapter 3, title 40, of the Revised Statutes, relating to *ex parte* interrogatories, and in refusing to
248 sustain the motion of the defendant that the said Sam. Ferris should not be permitted to testify concerning the matters covered by such interrogatories for the reason that the statute of 1897, forbidding the taking of *ex parte* interrogatories when a corporation is a party, is contrary to and in conflict with the 14th amendment to the Constitution of the United States in this, that it deprives the defendant corporation of the equal protection of the laws, as will more fully appear from the defendant's bill of exceptions No. 2."

26. The appellant shows to the court that counsel of record for appellees are Judge John W. Parker, who resides at Taylor, in Williamson county, Texas, and Hon. Sidney L. Staples, who resides at Smithville, in Bastrop county, Texas.

For and on account of each and all of the foregoing errors committed by this court in its disposition of this cause and for and on account of the foregoing reasons, it is respectfully submitted that the court should set aside the judgment rendered herein on April 21st, A. D. 1900, grant a rehearing hereof, and that upon such rehearing this cause be reversed and remanded to the court below for a new trial, with proper instruction from this court in the premises.

Respectfully submitted.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY OF TEXAS,
Appellant.

By BROWN, LANE AND GARWOOD AND B. D. ORGAIN, *Attorneys.*

(Endorsed:) No. 1011. No. 2356, with app. No. 2672. Missouri, Kansas and Texas R'y Co. of Texas, appellant, *vs.* Mollie F. Ferris *et al.*, appellees. Appellant's motion for rehearing. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas,

Mar. 31, 1900. R. H. Connerly, clerk. Overruled. Filed in supreme court May 15, 1900. Chas. S. Morse, clerk.

249 *Appellees' Reply to Appellant's Motion for Rehearing.*

Filed April 9th, 1900.

In Court of Civil Appeals for the Third Supreme Judicial District.

MISSOURI, KANSAS & TEXAS R'Y CO. OF TEXAS, Appellant,
vs.
MRS. MOLLIE F. FERRIS ET AL., Appellees.

Reply to appellant's motion for rehearing.

Counsel for appellees will notice only those assignments of error on which counsel for appellant submit an argument, believing that they are the ones mainly relied on, and that the others are sufficiently answered in appellees' brief.

I.

In view of the facts of the case, the court did not err in failing to submit in his main charge the question whether the deceased was not guilty of contributory negligence because he did not stop before entering upon the crossing, or in refusing defendant's special charge No. 3, presenting that issue, as claimed in appellant's ninth, tenth, and eleventh assignments of error, for the following reasons:

1. The proof showed conclusively that from the right of way, which was fifty feet distant from the crossing, the view was open and unobstructed as far as the curve, which was a distance of about one-third of a mile, and it was therefore unnecessary for those in the wagon to stop in order to look and listen for an approaching train, because they could have seen and heard an approaching train as well without stopping. The only occasion where it would be necessary to stop would be where the view was shut off until the person got so near the crossing that he would then not have time to avoid the train. This position is borne out by the opinion of our supreme court in the case of G., C. & S. F. R'y Co. *vs.* Smith, 87
250 Texas, 354, where this language is used:

"To illustrate the meaning and application of the rule (respecting ordinary care), let us suppose that a man driving a team of horses approaches a railroad crossing upon a public highway and at the same time a train approaches upon the railroad track. The degree of care required of the man with the team and those operating the train is the same, but one is using the means of travel usually easily controlled, and he is to make use of such precaution as a man of ordinary prudence would use in driving a team of horses under the same circumstances, while the engineer on the railroad must observe those measures of precaution which a man of ordinary prudence would use under like circumstances if operating an engine. Each must act according to the apparent danger and the ability to

control the instruments of travel under his control; for instance, the man with the horses might drive at a rapid gait to a point near the track because he can readily halt; but if the street or highway crossing were so situated as to be especially dangerous, or one at which there was a great deal of crossing, the engineer could not take the risk of controlling his machinery running at a high rate of speed, but must in the exercise of ordinary care bring his engine under such control as the situation and circumstances demand, consistent with the carrying on of the business. So, too, the amount of care to be used will vary with the same person under changed conditions. If an engineer should on his run come to a crossing in an open country, where he could see the track for a long way ahead and objects for a great distance on each side of it, and seeing no one near, he might safely run at the usual rate of speed. Continuing on his trip, he may come to another crossing in a more populous country, where the crossing of persons is more frequent and the approach to the crossing is through a cut and upon a curve, whereby he is not able to discover the presence of those who may be there rightfully. At the latter crossing he must not act as at the former, but is required to bring his locomotive under such control as will enable him to reasonably protect those that may be there
251 lawfully, as well as to give the signals required by law. If the same engineer on the same trip should arrive at a point where in a large city a public highway is to be crossed, at which it is common for the inhabitants to cross the railroad track in great numbers, he must adapt his measures of caution to these conditions. The same man of ordinary prudence operates the train at each place, but acts differently at each. The standard is the same—that is, the conduct of a man 'of ordinary prudence'—while the diligence exercised may be ordinary or it may be great, according to the requirements of changed circumstances."

There are no set formulas to be given in charge to a jury, but the law applicable to the facts of each case is to be applied. In doing this the court will use common sense. A man approaching a crossing in a prairie, where a train coming could be seen coming for miles on either side, would subject his reason to grave suspicion if he stopped in order to look and listen, and there would be as little sense in stopping for that purpose where the view was unobstructed for a third of a mile. The time consumed in the stop for the purpose of looking and listening under such circumstances could be much better employed in getting over the crossing. The facts showing that it was not necessary for those in the wagon to stop in order to a proper exercise of their senses of sight and hearing, the real question was, did they use those senses as a man of ordinary prudence would have done under the same circumstances? and on this point the court correctly instructed the jury in its main charge (court's charge, paragraph- 5 and 6, Appellee's Brief, pp. —).

II.

But, even if it would have been proper for the court in his main charge to have submitted the question whether the deceased should

not have stopped before going upon the crossing, the charge given stated correctly the general proposition of law as to the deceased's duty in approaching the crossing, and appellant cannot complain of the refusal of the court to give its special charge No. 3, for the reasons: (1) that the special charge announced an incorrect
252 proposition of law, and (2) it eliminated a ground of recovery relied upon by plaintiffs.

That the court's charge at least states the general proposition of law correctly. M., K. & T. R'y Co. of Texas *vs.* Rogers, 91 Texas, 57; G., C. & S. F. R'y Co. *vs.* Shieder, 88 Texas, 167.

It will be seen that the charge was a much more specific application of the law to the facts than the charges approved in the cases cited. The defendant claimed that the deceased did not look and listen, and the charge told the jury that in order to find for the plaintiffs they must believe that the deceased and those in the wagon with him looked and listened, and it is not perceived how the charge could have made a more direct application of the law to the facts. It seems that Judge Brown, who rendered the opinion in the Rogers case, took the view that it was not necessary to do anything more than submit "whether a failure to look or listen" would constitute negligence. While the special charge requested had the word "stop" in it, he ignored it as essential to a proper charge.

The contention that the special charge announced an incorrect proposition of law is made because the charge in effect imputed the negligence of Cass Ferris to the deceased. Cass Ferris was driving the team, and Jas. Ferris was riding in the wagon with him, and if it was any one's duty to stop it was Cass Ferris', and his negligence in failing to do so could not be imputed to Jas. Ferris. M., K. & T. R'y Co. of Texas *vs.* Rogers, 91 Texas, 58, paragraph at bottom of page.

The case referred to is one where the party suing was injured while riding in a wagon driven by another, and the court held that the negligence of the driver could not be imputed to the plaintiff.

Appellees refer to their proposition, pages 17 and 18 of their brief, and the statement thereunder, as showing that the special charge and all other asked by defendant going to — plaintiff's right of recovery, eliminated a ground of action pleaded by plaintiffs, and in support of which there was abundant proof. Indeed, the statement of the engineer Pepples' evidence is not as strong as the rec-
253 ord warrants. He testified that if the fireman Slocum had called his attention to the wagon at the time Slocum testified he saw it, that he then could have stopped the train and avoided the collision. Not having the transcript before counsel, they cannot refer to the pages of the record where the evidence may be found (Tr., 188, 189).

It is true that this witness, after stating that he saw the wagon and team moving in the direction of the crossing, in another place undertakes to make the impression that he did not know whether they were or not, and still in another says he though- the team had stopped; but, the facts showing conclusively that the wagon was approaching the crossing, the jury were not bound to believe the

evidence of the witness. They could believe that when he says he saw the wagon he realized that it was approaching the crossing, for that is what it was doing. Indeed, taking the plaintiffs' evidence, which shows that the team had already gotten upon the approach to the crossing before the train rounded the curve, and the testimony of defendant's witness Parsons that the heads of the animals were close to the rails when the train rounded the curve, and the jury would have been warranted in finding that the fireman saw the wagon and team much earlier than he says he did, and that Pepples saw them, notwithstanding he denied that he did, for the reason that they were in full view and could have been seen by them for a distance of one-third of a mile. Brown *vs.* Griffin, 71 Texas, 639; Railway Co. *vs.* Boozer, 70 Texas, 537.

In the former case it is distinctly held by the supreme court that a jury is not bound to believe a fireman upon an engine who says he did not see a person when "there was nothing in front of it to obstruct his view of the track. The jury might have presumed from this that he did see the plaintiff," etc.

The argument is made, however, that the special charge and the other charges requested by defendant ought not to be held to be obnoxious to the objection that they excluded a ground of recovery plead and proved by plaintiffs, and for that reason were improper to be given, because the court ruled that the question was not
254 in the case. The conclusion that the court so ruled is based upon the fact that the court refused a special charge asked by plaintiffs requesting the submission of the issue. Because the court refused the special charge did not necessarily show that he considered that the evidence did not give rise to the issue. The court might have refused the charge because he did not think it an accurate statement of the law. It was not the court's duty to revise the charge. Railway *vs.* Shieder, 88 Texas, 167. But, however this may be, there is nothing in the record tending in the remotest degree to show that the court ever at any time indicated to defendant that he did not consider the question was an issue in the case. It does not appear when the special charge requested by plaintiffs was rejected—whether before or after defendant presented its special charges—and therefore this court cannot say that the rejection of plaintiffs' special charge had any effect upon the defendant in the preparation of its special charges. The rule is that a party desiring to have presented to the jury his defenses by special charges must "at his peril" frame and submit such charges as are correct statements of the law, in view of the pleadings and evidence. Railway *vs.* McGlamory, 89 Texas, 639.

It is the issues made by the pleadings and the evidence that the charges, both general and special, must be made to apply to. Because an issue was not submitted in any charge does not require that it be ignored in considering whether the verdict should be sustained. Harkey *vs.* Cain, 69 Texas, 159. Indeed, a verdict against a charge when the same is erroneous will be sustained. Wright *vs.* Wright, 6 Texas, 23.

It is also the law that the court is not bound to charge a jury un-

less requested to do so (Robinson *vs.* Varnell, 16 Texas, 387; Berry *vs.* Railway Co., 72 Texas, 620), and it is well settled that the failure of a court to submit a ground of recovery or defense is no reason why the judgment should be reversed. T. & P. R'y Co. *vs.* Gay, 86 Texas, 609, citing a number of cases. These authorities necessarily establish the principle that a jury may render a verdict upon
255 the issues made by the pleadings and evidence without any instructions from the court or with only partial instructions, and that a court in determining whether a verdict should be sustained will look to the pleadings and evidence and not alone to the charge of the court.

The pleadings and the evidence giving rise to the issue, the verdict of the jury, which was a general one, was a finding on the issue in plaintiffs' favor. Hardy *vs.* De Leon, 5 Texas, 211; Wells *vs.* Barnet, 7 Texas, 584; Smith *vs.* Johnson, 8 Texas, 419; Hamilton *vs.* Rice, 15 Texas, 385. It was also a finding against the defendant on the issue. N. Y., T. & M. R'y Co. *vs.* Gallaher, 79 Tex., 685. The charge of the court being in all respects sufficient in the absence of any proper request for special instructions, the finding on this issue alone in favor of the plaintiffs is sufficient to call for an affirmance of the judgment. Arnold *vs.* Penn, 32 S. W., 354.

Appellant's counsel complain of the injustice of the holding that required it in the submission of its special charges to connect with them a proviso saving to plaintiffs their right to a finding by the jury upon the issue of discovered peril, because plaintiffs' special instruction on that subject had been refused. The situation was this: The pleadings and evidence gave rise to the issue whether the employés in charge of the train did not discover the peril of the parties in the wagon in time to have stopped the train, and plaintiffs requested the court to charge the jury upon that aspect of the case. The court refused this charge. The defendant requested certain special charges which eliminated the said ground of recovery from the case. From the argument submitted it appears that counsel for appellant in the court below combatted plaintiffs' right to have the issue submitted to the jury, and the inference cannot be escaped that they opposed the giving of plaintiffs' special instruction.

They now make the contention that because the court refused the special instruction requested by plaintiffs that that fact made it the duty of the court to give the special charges asked by defend-
256 ant. Just how the erroneous action of the court in refusing plaintiffs' special request could legalize the opposing ones of defendant is difficult to perceive. Because the court erred in ignoring one of plaintiffs' grounds of recovery did not make right the defendant's special charges, which likewise ignored it. The test whether special charges should or should not have been given is not the view the court below took of them, but whether they conformed to the pleadings and evidence. Looking to these, the issue under consideration was clearly in the case, and the demand of the law was that the court should give the plaintiffs' special charge, or at least submit the issue in some proper form, and that he refuse the oppos-

ing special charges requested by defendant, and because the court saw proper to disobey the law, did not change the plaintiffs' right.

The only pretense of an excuse appellant could have for not framing its special charges so as not to eliminate the said ground of recovery would be that the court led it to believe that it would not submit the ground. But, as already pointed out, it nowhere appears in the record that appellant was misled by any action of the court. On the contrary, it appears that appellant's counsel brought their influence to bear upon the court to get him to reject plaintiffs' special charge, because it appears that they contended that the evidence did not give rise to the issue. Certainly, after inducing the court to thus rule, the appellant will not be permitted to claim that it was misled by the court. To do so would be akin to seeking to take exception to a charge given by the court where the same was requested in a special instruction, but which was refused, and it is well settled that this cannot be done.

The contention is further made that though the special charges were not proper to be given because they eliminated one of plaintiffs' grounds of recovery, they were sufficient "to call the attention of the trial court to the issue, and to make it an error for him to refuse to submit the issue." The rule contended for applies only where there is an entire absence to charge. Where this is the
257 case an inaccurate charge is sufficient to call for an appropriate one to be given by the court; but when the court has given a charge which states the general proposition of law correctly, then, in order for a party to have a special request given making a particular application of the law, he must frame and submit one that is in all respects correct and applicable. This proposition is supported by the authorities already cited on the point that the court's charge was at least an accurate statement of the general proposition of law applicable to the facts of the case, namely, G., C. & S. F. R'y Co. *vs.* Shieder, 88 Texas, 167; M., K. & T. R'y Co. *vs.* Rogers, 91 Texas, 58.

The reason for the rule would seem to be that it being the duty of the court to submit all the issues, that when he omits to submit one the omission will be referred to oversight or inadvertance, and that it only ought to be necessary to call his attention in order to have him perform his duty by submitting a proper charge; but when he has given a charge which is correct as a general proposition, then, in order for a party to have a special charge on the same subject given, he must present the court with a perfect one, because where the court has given a good charge it would be no help to present him with an imperfect one. The special charges being bad because they eliminated a ground of recovery, the court correctly refused them.

III.

The defendant's special charge No. 29 was not proper to be given, because there was no evidence to warrant it. The proof showed that the crossing formed a part of a public highway; that defendant allowed one of its locomotives to stand near the crossing and to per-

mit steam and smoke to issue therefrom; that it could have been stood 200 yards or more away from the crossing, and that when the team got to about the foot of the dump leading up to the crossing the animal took fright at the engine.

Those in the wagon, including deceased, had a right to use the public highway, and to do so without laying themselves liable to any charge of contributory negligence. It appears from the
258 evidence that defendant had been in the habit of standing an engine at the place for two years or more. Certainly defendant will not be allowed to place an engine so near a public crossing as to menace the safety of persons in wagons for so long a time, and then claim that those who may be injured by its negligence cannot recover because by using the crossing they were themselves guilty of contributory negligence.

The charge was also improper to be given because it made the question of contributory negligence turn upon whether the deceased "saw, or by the use of ordinary care could have seen, such switch-engine, and that they nevertheless undertook to pass in close proximity to said engine, and that thereby such animal became frightened, and so drew their attention that they failed to notice or listen for an approaching train, and that by reason of such failure the injury occurred." Certainly it does not follow as a proposition of law that because those in the wagon "saw, or by the use of ordinary care could have seen, such switch-engine" and undertook to pass in close proximity thereto, and that thereby the animal became frightened and drew their attention and caused them to be injured, the deceased was guilty of negligence. The charge made the driving of the team near the engine and the consequent frightening thereof negligence as a matter of law, whereas at most it was a question of fact to be determined by the jury.

IV.

The court did not err in refusing to sustain appellant's assignment of error attacking the sufficiency of the evidence to sustain the verdict and judgment.

Instead of the facts showing that the deceased and his companions "drove madly into an approaching train which he saw for more than 600 yards," the facts show that the team drawing the wagon in which the deceased was riding was caused to be frightened by one of defendant's locomotive engines which it wrongfully stood near the crossing, and that while his and the driver's attention was drawn thereto those of defendant's employés in charge of one of its
259 passenger trains ran the same at a reckless rate of speed, without sounding any whistle or ringing the bell and without keeping any proper lookout ahead, and struck the wagon and killed the deceased.

Great stress is laid by counsel for appellant upon the fact that the deceased could have seen the train approaching for 600 yards, but the fact the engineer and fireman could have seen him for the same distance, and that they had nothing to divert their attention, while he did, is entirely overlooked by them. It was the engineer's and

fireman's duty to be on the lookout and to have their train under control, and no sound mind can contemplate the facts of this case and not reach the conclusion that the jury were fully justified in finding that the deceased lost his life because of the negligence of defendant.

Respecting what is said by the court as to the preponderance of the evidence as it appears in the record being against the deceased, counsel for appellees assert that such preponderance is more apparent than real. It can be demonstrated from the record that plaintiffs had a preponderance on every issue of negligence alleged against defendant, both in numbers and weight, and judging the evidence according to its credibility and weight, they had a preponderance on the issue of contributory negligence and every aspect of it. As regards the intoxication of the parties, the defendant's evidence will not bear close analysis, but even if it showed they were intoxicated that would not establish that they were guilty of contributory negligence. Their intoxication was a fact the jury could consider in determining the question of contributory negligence. It is not pretended that the Ferris- were drunken to insensibility. Indeed, defendant's own evidence showed that they were attending to their own business—going to the shop for a plow-point, making purchases in the store, etc. Plaintiffs' testimony showed that the parties were sober. Looking at the testimony from any standpoint, the question of intoxication was one for the jury, and they having decided it against appellant, this court will not disturb the finding.

260 But the parties could have been drunk—drunk as the appellant would like to make them—and still the plaintiffs be entitled to recover on the issue that the peril of deceased was discovered by the employés in charge of the engine in time to have avoided the collision by the exercise of proper care on their part.

Appellees respectfully ask that the motion for rehearing be denied.

SIDNEY L. STAPLES AND
JOHN W. PARKER,
Attorneys for Appellees.

(Endorsed:) No. —. M., K. & T. R'y Co. of Texas *vs.* Mollie F. Ferris *et al.* Appellees' reply to appellant's motion for rehearing. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, Apr. 9, 1900. R. H. Connerly, clerk.

Order Overruling Motion for Rehearing, Made April 25th, 1900.

Motion 1011.

M., K. & T. R'y Co. of Texas
vs.
Mrs. Mollie F. Ferris et al. } No. 2356.

Appeal from Bastrop county.

Motion for a rehearing. The motion is overruled.

261 *Application for Writ of Error to Supreme Court of Texas.*

Filed June 20th, 1900.

In the Supreme Court of Texas.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY of Texas, Appellant,
vs.
MRS. MOLLIE F. FERRIS ET AL., Appellees,
No. 2356.

Appeal from Bastrop county, Texas.

Application for writ of error.

To the honorable supreme court of Texas:

This is a suit for damages instituted in the district court of Bastrop county, Texas, by defendants in error against The Missouri, Kansas and Texas Railway Company of Texas, plaintiff in error, on January 31st, 1899. On June 24th, 1899, there was verdict and judgment against plaintiff in error in the district court of Bastrop county, Texas, for the sum of ten thousand dollars. This judgment was affirmed by the court of civil appeals for the third supreme judicial district on February 21st, 1900. A motion for rehearing having been filed in that court within fifteen days thereafter, the same was overruled on April 25th, 1900, and the said The Missouri, Kansas and Texas Railway Company of Texas here now makes application for issuance of writ of error to said honorable court of civil appeals for the third supreme judicial district, sitting at Austin, Texas, and for cause relies upon the following assignments of error, each of which was presented to said court of civil appeals and by it decided against this petitioner:

Assignments of Error.

1. The district court erred in refusing to give special charge No. 3 requested by plaintiff in error, defendant in the court below, and the court of civil appeals erred in overruling and failing to sustain the ninth assignment of error based thereon, which is as follows:

262 "*Ninth Assignment of Error.*

"The court erred in refusing to give charge No. 3 asked by defendant, as follows:

"It is the duty of one approaching a railroad crossing to exercise the care and prudence that a man of ordinary care would exercise under the same circumstances, and if you should believe that in the exercise of such care it was the duty of James Ferris to have stopped before driving upon said railway, and that he failed to do so, or if you should find that in the exercise of such care it was his duty to look and listen for an approaching train, and that he failed to do

so, and you should find that under all the circumstances he was negligent, and that such negligence contributed to the injury complained of, you will return a verdict in favor of the defendant."

2. The court of civil appeals erred in overruling plaintiff in error's tenth assignment of error, which is as follows:

"*Tenth Assignment of Error.*

The court erred in paragraph five of its charge to the jury in failing to charge that if the jury believed that under all the circumstances of the case an ordinarily prudent man would have stopped before approaching the crossing, and that defendant failed in this respect, and that such failure contributed to the injury complained of, they should find for the defendant, the court thereby eliminating the failure of the deceased to stop, if he did so fail, from the case as proof of negligence."

3. The court of civil appeals erred in overruling the eleventh assignment of error herein, which is as follows:

"*Eleventh Assignment of Error.*

"The court erred in paragraph six of its charge to the jury wherein it instructed the jury as to what negligence of Cass Ferris and William Ashley would be imputed to the deceased, James Ferris, in this, that in said paragraph he eliminated from the consideration of the jury the failure of said parties or either of them to stop as an
263 element of negligence herein, the proof tending to show that they failed to stop, and that under the circumstances of this case such failure was negligence."

Statement under Three Preceding Assignments.

(*a.*) The court of civil appeals (55 S. W. Rep., 1120) admits that the pleadings and the evidence made the failure of deceased and his associates to stop before entering upon the crossing an issue of negligence in the case.

(*b.*) The view was obstructed. T. J. Hardeman (pp. 86, 87, Tr.). If a man was traveling in an empty two-horse wagon, approaching this crossing from the south, he would find his view to the north of the crossing obstructed by some wesatch bushes after he reached the switch leading down to Powell's gin. From that point he could see northwards to the south end of the bridge, about 337 feet, and from there on the view would be obscure—that is, it would not be a clear view. If a man would stop and move about and get into position to see, he might see clear up to the curve. Cass Ferris (pp. 84, 85, Tr.). There is some brush there that kept me from seeing the train. I guess the reason I did not see the train was because of these bushes. You cannot see up the railroad track until you get half way up the dump. T. C. Wilson (p. 106, Tr.). On January 28, 1899, there were some small wesatch bushes close to the right of way on the east side of the track. After you cross the Powell switch, 185

feet south of the crossing, the view north of the bridge is obstructed (the bridge is 337 feet north of the crossing). There is a partial view through the undergrowth and brush obscuring somewhat the view of the track north of the bridge. It would be a little difficult for a person riding in a wagon to see beyond that point. He would have to pick out a view through the brushes which have grown up on the far end of the flat and obstruct the view north of the bridge.

(*c.*) The approach to the crossing is dangerous. Cass Ferris (p. 91, Tr.). The crossing was pretty steep and not wide enough to
264 turn a wagon and team on. It was about 12 feet wide. T. J. Hardeman (p. 86, Tr.). The approach to the crossing was forty feet long and eighteen feet wide. The grade is a five and two-tenths feet rise in forty feet. The sides of the approach have a slope of one and a half feet to each perpendicular foot. It is a right steep approach, though not impracticable to travel. Bob Sawyer (p. 116, Tr.). The crossing was very steep. It was not wide enough to turn a wagon on. After a wagon and team had gotten half-way up the dump they could not have turned around and gone back. Cass Ferris (p. 90, Tr.) states that he saw switch-engine standing 27 feet south of the crossing, emitting steam and smoke; saw this when he was twelve feet from the bottom of the dump. Mule was a scary animal.

(*d.*) The parties knew that this train was due at this crossing at this time and knew the character of the crossing. It is not disputed that their train producing the collision was the regular south-bound passenger train, and that James Ferris, deceased, knew that it was due at this crossing at this time, and that they were acquainted with the crossing. (See testimony of Sam. Ferris, p. 100 *et seq.*, and Cass Ferris, p. 91 *et seq.*, of Tr.).

(*e.*) The parties did not stop before entering upon the crossing. Sam. Ferris (pp. 101, 2, Tr.). They trotted right along till they got a little ways up the dump, and I was coming along behind them. They trotted some ways upon the dump before they began to back. The wagon did not stop at the bottom of the dump. Uncle Cass might have whipped the horses once or twice. Mrs. R. J. Shephard (p. 115, Tr.). The parties trotted upon the dump. The horses were coming tolerably peart. Clyde Reese (p. 180, Tr.). The team walked right up the hill; they did not stop at all until they stopped in the middle of the track. Ledlie Arnold (p. 166, Tr.). Saw the parties as they approached the dump. At the time they drove up passenger train was half-way from curve to crossing, and as they drove onto dump train was at south end of crossing.
265 They were trying to rush the horses on the crossing. Sam. Standifer (p. 153, Tr.). First saw wagon near foot of the crossing. Team did not appear to be frightened and they continued to trot up to the crossing. W. L. Johnson (p. 175, Tr.). About time train whistled I noticed the wagon driving towards crossing, and as the train drew nearer and had whistled for street crossing I noticed that wagon kept on driving towards the crossing in a pretty lively trot, and as the train drew near and the wagon drew near to the

crossing I said, "Look yonder; those fellows are going to get struck!" and then, of course, they were pretty close together, and when the horses came up close to the crossing they came to a stop and the driver raised the lines and sto-pped them; they sprang forward and were struck. When I first saw the wagon it was approaching the crossing in a good, fast trot.

Argument.

The testimony, it is admitted by the court of civil appeals, fairly raises the issue that deceased was negligent in not stopping before entering upon the crossing, and that this negligence contributed to the injury. Plaintiffs alleged and introduced testimony to show that the crossing is high, steep, narrow, and dangerous. Plaintiffs alleged and introduced testimony to show that the view northward from the crossing is obstructed by wesatch bushes. Hardeman, plaintiffs' witness, states that while the view is obstructed by these bushes, if one approaching the crossing would stop and observe he could get a view through them. The deceased was acquainted with the crossing and knew that the train, a regular passenger, was due at or about that time. He knew that on the front seat of the wagon, beside the driver, sat one William Ashley, wholly drunk, and that Cass Ferris, the driver, was drinking. One animal was scary, and near the crossing stood a switch-engine, which plaintiffs' testimony shows was emitting steam. All the testimony in the case shows that the deceased and his companions drove on to this steep, narrow, high crossing,
266 the view from which was obscured by bushes, with a scary horse and a drunken crowd, in a trot, without even for one instant stopping to ascertain whether any train was approaching or not. If it is possible to conceive a case where a failure to stop is contributory negligence, this is such a case. The company specially pleaded that deceased and his companions failed to stop, and that such failure was negligence contributing to the injury. It asked a charge upon this proposition set out in the ninth assignment of error. The court of civil appeals admits in its opinion that the evidence raises the issue. This may be considered a finding of fact to that extent. It also finds that the evidence preponderates against the verdict, "especially upon the issue of contributory negligence." The refusal of the charge, therefore, if error, was material error. The requested charge is not objected to upon any ground. Its refusal is justified "because there was one ground upon which plaintiff sought a recovery and which there was testimony tending to support which was not affected by the contributory negligence of the deceased and his associates, if such negligence was shown. If the occupants of the wagon, although guilty of contributory negligence, were discovered by the employés operating the train to be in a situation of imminent peril, as the testimony tends to show, then it was their duty to use the greatest precaution to avoid the collision, although the occupants of the wagon may have been guilty of negligence in placing themselves in that position, and the failure of those operating the train to use the degree of care referred to under the circumstances stated

would entitle plaintiffs to recover, notwithstanding the previous negligence of James Ferris and his associates. Therefore the requested instruction was properly refused." Abstractly, this is correct law; but the charge of the trial court did not submit the issue which the court of civil appeals says we must submit by way of qualification to a proper charge. On page 52 of the transcript it will be seen that the plaintiffs in trial court asked a charge
267 to the effect that although the jury should find that deceased and associates were negligent, yet if the employés operating the train discovered their imminent peril in time by the use of all the means at their command to stop the train and avoid the collision, and they failed to do so, that plaintiffs could recover, notwithstanding the contributory negligence. This charge the court refused, because there was no evidence to justify the submission of any such theory. The plaintiffs in the court below make no complaint of this action of the trial court and file no assignment of error. The court of civil appeals, however, discovers a scintilla of evidence upon this rejected theory and holds that it was the duty of the defendant railway company to correct this supposed error of the trial court, and deliberately agree to the submission of an issue against it, which the trial court had rejected. In other words, a defendant, before it can secure a legal instru-tion upon a pertinent issue conceded to be raised by the evidence, must at his peril see that the court has properly submitted plaintiff's case. This is to constitute defendant the plaintiffs' guardian. With due deference to the court of civil appeals, we submit that this is utterly subversive of the true theory of a trial at law; that no authority can be found for the position in this State or elsewhere; that it cannot be justified by any course of reasoning. A defendant meets the case submitted to the jury. It is not its duty to say to the trial court, "You must submit another accusation against me." The accusations of negligence submitted to the jury against us in this case are: 1. Failure to ring the bell and blow the whistle. 2. Excessive speed. 3. Permitting a switch-engine to stand near the crossing. The trial court held that this constituted plaintiffs' case and all of their case. These issues it submitted to the jury and none other. To this case as submitted the contributory negligence pleaded and presented in the charge refused was a complete bar. This is admitted by the court of civil appeals. Now, that court discovers,
268 what the trial court does not discover, that there is another issue in the case. It is true that appellees, plaintiffs in the court below, had acquiesced in the action of the trial court. It is true that they make no complaint and assign no error upon the court's action in refusing to submit the issue of negligence after imminent peril discovered. Nevertheless by this new theory of trial practice the defendant is required to assume the burden of maintaining plaintiffs' rights, and in order to secure a proper defensive instruction must agree to the submission against it of an issue held not to be in the case. If this new theory obtains, it is always to the interest of plaintiff that the trial court should not submit a doubtful issue. He thus takes no risk of a reversal for the submission of a theory not justified by the evidence. The u*b*submitted issues, how-

ever, stand guard, and though dead, yet liveth. The defendant at his peril must determine whether there is a scintilla of evidence to justify it. His only safe *cause* is to surrender the point and agree to its submission, else he may be refused a proper instruction in the case which actually goes to the jury. Let us analyze this novel and startling doctrine of trial practice. Plaintiff sues for land. He relies for recovery—1, upon paper title direct; 2, upon title by limitation. The trial court does not believe that the evidence will justify the submission of the second issue, and the case goes to the jury upon the first issue alone. There is an issue of forgery. The defendant asks a charge that if the jury believes a certain deed in the plaintiffs' chain of title is a forgery, they should find for the defendant. Now, under the theory propounded by the court of civil appeals, if it should be found that there was a scintilla of evidence supporting the excluded issue, the defense could not have a charge upon the issue of the forged deed, unless he should admit that the second issue should be also submitted. The requested charge, then, should read, "If you believe that the deed from A to B is a forgery, you will find for the defendant, 269 unless you should find for the plaintiff upon the issue of limitations, the law of which you do not know and concerning which the court declines to instruct you." The particular form of the accusation made against him is something that the defendant cannot control. It is not material to him who shapes it, whether the plaintiff or the court. He is entitled to a submission of his defense to the case as made, whether made by court or plaintiff. He is not compelled before the jury to defend himself against a case not submitted to the jury. This is exactly what the court of civil appeals compels us to do. The trial court said to the defendant, you shall not be tried before the jury upon the issue of negligence after imminent peril discovered. The court of civil appeals tells us that we should have framed every charge to guard against an issue which we had been expressly told was not in the case. Let us follow this novel theory further and see to what extraordinary conclusions it will conduct us. The appellate court does not know at what time the court withdrew from the jury the issue of negligence after imminent peril discovered. Knowing that no such issue would be submitted, the defense does not offer evidence thereon. Suppose defendant had the verdict and plaintiff appealed, assigning that the verdict was contrary to the evidence. If the court of civil appeals should find that there was evidence supporting the excluded issue, it might reverse and render the case, because the uncontradicted testimony showed that while deceased was negligent defendant's servants discovered his imminent peril in time to have prevented the injury and failed to use proper care. Defendant would urge that the issue was not submitted, and therefore it introduced no evidence upon it. The court of civil appeals would reply, "True, true, but it ought to have been submitted. You may have sate still and let the trial court take its own course, but you must see to it at your peril that the trial court properly submits plaintiffs' case. It was your duty

to request the court to submit the issue against you
270 and then introduce evidence upon it. You had an opportunity to do so. Having introduced no evidence, there is no conflict in the testimony, and we will reverse and render." This is fully as logical as to require the defendant, in framing his charges, to explain the law pertinent to an issue which the court has refused to submit. The only case cited to sustain the position taken is City of Dallas *v.* Jones, 53 S. W., 377. In that case there were two counts of negligence. The charge of the court covered both, and the requested charge covered but one issue, ignoring the others. In the case at bar, however, the trial court has declined to submit the very issue which it is argued we must agree to submit in order to get in our defenses. As a matter of fact, there was not a scintilla of evidence to the effect that the agents of the company discovered the imminent peril of deceased in time to have prevented the injury by the use of proper care. The uncontradicted testimony shows that the engineer did not and could not see the parties, and that when the fireman saw them they were in a place of safety and not in a place of peril. We earnestly invoke the attention of the court to this contention, which we believe is subversive of the universally received theory of trial practice. A judgment has been rendered which the court of civil appeals admits is contrary to the preponderance of the testimony, "especially upon the issue of contributory negligence." That court finds as a fact, which is binding upon this court, that it was a pertinent and material issue raised by testimony as to whether the failure of deceased and his associates to stop before entering upon the crossing was negligence contributing to the injury. Neither the court of civil appeals nor counsel for defendants in error object to the form of the charge, save only that we did not add to it an issue which the trial court had refused to submit. To this we say that a defendant fights the case made against him. He
defends against the case submitted to the jury. The charge
271 requested presented a complete defense to such case. The trial court, in submitting plaintiffs' case, applied the law to the fact, submitting the several issues relied upon. Nowhere are the defenses pleaded affirmatively submitted. Under the decisions of this court, we were entitled to such submission, and it has been wholly denied.

4. The court of civil appeals erred in holding as a matter of fact that there was evidence tending to show that the servants of the railway company discovered the imminent peril of deceased in time by the use of proper care to have prevented the injury, because there is no evidence whatever to sustain such finding of fact.

5. The court of civil appeals erred in holding as a matter of fact that there was evidence tending to show that the servants of the railway company discovered the imminent peril of deceased in time by the use of proper care to have prevented the injury, because the trial court having found there was no such evidence and refused to submit such issue, it was the duty of defendants in error to complain thereof by cross-assignment, which they have failed to do.

Argument.

The court of civil appeals justifies the refusal of every charge on contributory negligence upon the ground that the railway company did not add to each the qualification that notwithstanding such negligence of deceased recovery might be had if the railway employés discovered his imminent peril in time by the use of the means at command to have prevented it. The trial court held that there was no evidence sustaining such theory and refused to submit it. The plaintiff in that court has now complained of such action of the court by assignment made thereon. There is an utter absence of any testimony raising the issue. The engineer did not and could not see them. When the fireman saw them they were in a place of perfect safety. Being drunk, they suddenly urged the team in
272 front of the engine when it was too close to stop it and avoid the collision. We believe it to be wholly immaterial for the purposes of this discussion whether the evidence tended to raise the issue or not. The trial court did not charge upon it, and that — eliminated from the case so far as we were concerned. We were not required to meet by requested charges an unsubmitted issue. As a matter of fact, however, there is an utter absence of evidence tending to raise the issue.

6. The trial court erred in failing to give requested charge No. 8 asked by plaintiff in error, and the court of civil appeals erred in refusing to sustain the twelfth assignment of error based thereon, which is as follows:

"*Twelfth Assignment of Error.*

"The court erred in failing and refusing to give charge No. 8 asked by defendant, as follows: 'It was the duty of defendant's employés operating the engine which came in contact with the wagon in which deceased, James Ferris, was riding to give signals of its approach by ringing the bell and blowing the whistle at the distance of at least eighty rods from the crossing where the collision occurred. The object of these requirements is to protect travelers on the highway approaching the crossing, and it is not required that these signals should be given at exactly eighty rods; and if you believe in this case that the whistle of defendant's engine was sounded at more than eighty rods from the crossing, but at such distance beyond that it could well have been heard at such crossing by a man of ordinar-y good hearing, this would be a compliance with the law with regard to the blowing of such whistle.'"

Authorities.

H. & T. C. R'y *v.* O'Neal, 47 S. W., 94.
Texas & Pacific R'y *v.* Bryant, 56 Fed. Rep., 799.

7. The court of civil appeals erred in overruling plaintiff in error's thirteenth, fourteenth, and fifteenth assignments of error, which are as follows:

273 "*Thirteen- Assignment of Error.*

"The court erred in paragraph No. 5 of its charge to the jury, which is as follows:

"'If, however, you believe from the preponderance of the evidence that the said James Ferris in approaching said crossing failed to look and listen for an approaching train, and you believe that a man of ordinary prudence would have looked and listened under the circumstances for a train before entering upon said crossing and railway, and that his failure to look and listen directly and proximately contributed to the striking of the wagon and his death, you will find a verdict in favor of the defendant, and this, too, though you may believe that the defendant did not use ordinary care in running its train up to and over said crossing,' said charge of the court being erroneous in this, that it distinctly instructs the jury that before they can find that James Ferris was negligent they must believe from the preponderance of the testimony that he must both fail to look and to listen, whereas the law is that if he either fails to look or fails to listen and such failure contributed directly to his injury, he would in either event be guilty of contributory negligence, precluding his recovery, and the evidence herein strongly presenting both issues. The court therefore instructs the jury that before they could believe James Ferris guilty of negligence they must believe that he failed to use both his sense of sight and his sense of hearing, the law being that if one approaching a railway crossing fails to use either his sense of sight or his sense of hearing and by the use of either sense he could have discovered the approach of the train and avoided the danger he cannot recover."

"*Fourteenth Assignment of Error.*

The court erred in paragraph 6 of its charge to the jury, wherein, in charging upon the negligence of Cass Ferris and William Ashley and in instructing the jury as to the circumstances under which the negligence of such parties would be imputed to the deceased, James Ferris, he repeatedly and continuously charged
274 the jury that in order to believe that either the said Ferris or William Ashley were guilty of negligence they must believe, from the preponderance of the testimony, that they and each of them both failed to look and failed to listen, whereas the law is that if such parties either failed to look or failed to listen for an approaching train, when by the use of either sense they could have discovered the approaching train, such persons would be guilty of such negligence as that if same was imputable to James Ferris neither he nor his heirs could recover."

"*Fifteenth Assignment of Error.*

The court erred in paragraphs five and six of its charge to the jury, wherein it instructs the jury, as above set out, that before they can find the deceased, James Ferris, guilty of contributory negli-

gence, precluding a recovery by his heirs, they must believe that he both failed to look and failed to listen before approaching the crossing, and in refusing to give special charges Nos. 4, 6, 16, 24*a*, and 25, in each of which charges the jury is instructed that a failure to look or a failure to listen, if under all the circumstances negligence and contributing to the injury, will preclude a recovery."

Argument.

It is submitted that under the charge of the court that the jury are instructed that before deceased can be guilty of contributory negligence he must both fail to look and fail*ed* to listen, whereas if he fails to look or fails to listen, and under the circumstances of the case such failure is negligence contributing to the injury, no recovery can be had. The court of civil appeals says we cannot complain because a charge was asked containing the conjunction and instead of the disjunctive or. The fact is overlooked that by special charges No. 4, p. 26; No. 6, p. 28; No. 16, p. 37; No. 24*a*, p.
275 44, and No. 25, p. 47, we sought to obtain instructions that failure to look or to listen, if under the circumstances negligence, precluded recovery. All of these being refused, it was sought to secure an instruction on the duty to stop and to secure this the court's idea was embodied in charge No. 3, which was also refused. Having asked five charges, each calling attention to the error complained of, it was conceived that this would be sufficient.

8. The court of civil appeals erred in overruling and failing to sustain the sixteenth assignment of error herein, which is as follows:

"*Sixteenth Assignment of Error.*

"The court erred in failing and refusing to give charge No. 12 asked by defendant, as follows: 'If you believe that at the time and place of the accident the said James Ferris was as far under the influence of intoxicating liquors as to be unable to exercise ordinary care, and such failure to use ordinary care contributed proximately to his injury, you will in that event find for the defendant, even though you should believe that its servants were at the time negligent, and that such negligence contributed to the injury of said James Ferris.'"

9. The court of civil appeals erred in overruling the seventeenth assignment of error herein, which is as follows:

"*Seventeenth Assignment of Error.*

"The court erred in failing to give charge No. 13 asked by the defendant, as follows: 'If you believe that Cass Ferris and William Ashley or either of them in approaching said crossing failed to act with ordinary care and prudence, and that under all the circumstances they or either of them failed to act with the care and prudence which a man of ordinary care and prudence would use under the circumstances, and that such failure was the sole cause of the accident, you will find in favor of the defendant.'"

Argument.

The evidence of acts on the part of James Ferris is meager.
276 He was in the back of the wagon and was drinking. It was an issue raised by the evidence that the accident was occasioned solely by the sudden and extraordinary action of Cass Ferris and Wm. Ashley, or one of them, in whipping the horses on to the crossing in front of the approaching train. If this was the sole cause of the injury there can be no recovery, and the evidence clearly raises the issue.

10. The court of civil appeals erred in overruling and failing to sustain the eighteenth assignment of error, which is as follows:

"*Eighteenth Assignment of Error.*

"The court erred in its charge to the jury in wholly failing and refusing to apply the law of contributory negligence to the facts of this particular case and in failing and refusing to give charge No. 6 requested by defendant for the purpose of obviating said defect, as follows:

"'The defendant railway company in this case, in addition to the general denial by which it denies that it has been guilty of any negligence in any of the particulars charged by the plaintiffs, or that such negligence, if any, was the cause of the injury complained of, pleads that the deceased, James Ferris, was himself negligent, and that his said negligence contributed directly and proximately to his injury. This is what is known in law as the defense of contributory negligence, under which you are instructed that even though you should believe that on the occasion inquired — the servants and agents of the company were negligent, and that such negligence contributed to the injury of James Ferris, yet if you further believe that the said James Ferris was also negligent, and that his negligence contributed to and co-operated with the negligence of defendant's servants in producing the injury, plaintiffs cannot recover; in other words, if both parties are negligent and the negligence of each proximately contributes to the injury, there can be no recovery; hence, in this case, although you might believe that at the time of the collision the agents
277 of the defendants were propelling the train at a greater rate of speed than a prudent man would have done under all the circumstances, or that they failed to ring the bell or blow the whistle as required by statute, or failed to use ordinary care in any of the particulars set out in the charge heretofore given you, or that such agents were guilty of all of such acts and omissions, and that under all the facts and circumstances they were negligent, and that such negligence directly contributed to the injury of said James Ferris, yet if you should further believe that the said James Ferris was familiar with the crossing and its approaches; that he knew that this particular train was due at said crossing at or about the time it did reach there; that at said time he was so far under the influence of intoxicating liquor as to be incapable of prudent action;

that at the time he approached said crossing Cass Ferris and William Ashley were under the influence of liquor to such an extent as to render them unable to prudently drive and direct the team and wagon, and that deceased, James Ferris, knew this at the time he embarked in said wagon; that said wagon was open and without cover; that deceased had a clear, plain, and unobstructed view of defendant's track at said crossing and for a long distance to the north thereof and to the south thereof for a long distance before he reached the said crossing and on the approach thereto and at said crossing, and that there was nothing to obstruct his view of an approaching train, and that by the use of ordinary care he could have seen or heard such train approaching from the north; that he did not look or listen to ascertain whether a train was approaching, or that if he did see such train approaching the crossing he endeavored to cross in advance thereof, and if you believe under all the facts and circumstances in evidence, taken together, that the deceased, James Ferris, in attempting to pass over said crossing in advance of the approaching engine failed to act with the ordinary and reasonable care and prudence of an ordinarily careful and prudent man under the same circumstances, and that such failure to act with
278 ordinary care proximately contributed to the injury of the said James Ferris, then, in that event, you will find a verdict in favor of the defendant.'"

Statement.

Mistakes of the printer makes this assignment as set out in pages 84, 85, and 86 of the brief herein unintelligible, and the court is referred to pages 237, 238, and 239 of the transcript therefor.

Argument.

The charge of the court submits to the jury but two elements of contributory negligence—the failure of deceased to look and listen—and does this in an abstract and colorless fashion. The defense presented is that deceased knew all about this crossing; knew that this particular train was due there at this particular time; knew that the driver of his team was drinking heavily; that he made no attempt to see or hear; that he could by any care have seen or heard; that if he did see the train he rushed heedlessly across, being himself too drunk to exercise care. All this is relied upon to show negligence. He may have looked; he may have listened; yet it may have been negligence to undertake the crossing under the circumstances in evidence. Defendant's case is nowhere affirmatively submitted. The refusal of this charge is clearly erroneous unless it falls under the general condemnation of the court of civil appeals that we should have concluded each charge on contributory negligence with this remarkable proposition: "If you find the foregoing facts to be true, and that deceased was negligent, and that such negligence contributed to the injury, you will find for the defendant unless you shall find for the plaintiff upon an issue which will not be submitted to you by the court, but which the defendant agrees

itself to submit, and which is that, although deceased was negligent, *and* nevertheless defendant's agents discovered his imminent peril in time to have prevented the injury and failed to do so." We thus come back to the original proposition which is urged against every charge upon contributory negligence. Is a defendant in his charges compelled to take into consideration, not only the case actually submitted against it by the trial court, but also the case which the court ought to have submitted? If so, the sword of Damocles hangs over his head continuously. If he permits the trial court to omit any theory of negligence by which he can be mulcted by plaintiff, he does so at the peril of being deprived of his defenses upon those actually submitted.

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11. The trial court erred in failing to give charge No. 24*a* asked by the defendant, and the court of civil appeals erred in overruling the nineteenth assignment of error, based upon said error, as follows:

"*Nineteenth Assignment of Error.*

"The court erred in failing to give charge No. 24*a* asked by defendant, as follows: 'Defendant company in this case, in addition to the general denial, by which it denies that it has been guilty of negligence in the particulars charged by plaintiff, or that such negligence, if any, was the cause of the injury complained of, pleads that the deceased, James Ferris, was himself negligent, and that those in the wagon with him were negligent in such manner as is imputable to him, and that such negligence contributed directly and proximately to his injury. This is what is known in law as contributory negligence, under which you are instructed that even though you believe that on the occasion herein inquired about the servants and agents of the defendant were negligent, and that such negligence contributed to the injury of James Ferris, you will, if you further believe that James Ferris was also negligent, of that Cass Ferris or Wm. Ashley or either of them were negligent under such circumstances as that their negligence would be imputable to James Ferris under the charge hereinbefore given you, and that such negligence contributed to and co-operated with the negligence of defendant's servants in producing the injury complained of, in that event plaintiffs could not recover. In other words, if both parties were negligent and the negligence of each contributed to the injury, there can be no recovery; hence in this case, although you might believe that the servants of defendant failed to ring the engine bell or blow the whistle, as required by statute, or failed to keep a proper lookout, or that they were propelling said train at a greater rate of speed than would have been used by men of ordinary care, or that they were negligent in any of the particulars hereinbefore given you in charge, and that such negligence directly contributed to the injury of said James Ferris, yet you are instructed that if you further believe that the said James Ferris was familiar with the crossing and its approaches; that he knew that this particular train was due at said crossing at or about the time it did reach there; that at the time of the collision he was so

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far under the influence of intoxicating liquors as to be incapable of prudent action, and that at the time they approached said crossing Cass Ferris and William Ashley were under the influence of liquor to such an extent as to render them unable to prudently drive, direct, and control the team on and over said crossing, and that deceased, James Ferris, knew this at the time he embarked in the wagon, and that said wagon was open, without covering, and that each of the occupants thereof had a clear and unobstructed view of defendant's track at said crossing and for a long distance to the north thereof, as well as to the south, before reaching said crossing and the approach thereto and at the same, and that there was nothing to obstruct his view of the approaching train, and that by the use of ordinary care he could have seen or heard said train approaching from the north, and that he did not look or listen to ascertain whether or not a train was approaching, or that if he did see said train he attempted to cross in advance thereof when it was at such distance from the crossing that a man of ordinary prudence would not have undertaken to make the crossing in front of it, and that if you believe that under all the facts in evidence, taken together, that the deceased,
James Ferris, in attempting to cross over said crossing at
281 the time and in the manner and under the circumstances developed in the evidence, failed to act with that ordinary and reasonable care and prudence which would characterize the action of an ordinarily prudent and careful man under the same circumstances, and that such failure to act with ordinary care proximately contributed to his injury, then, in that event, you will find a verdict in favor of defendant.'"

12. The trial court erred in refusing to give special charge No. 9 asked by defendant, and the court of civil appeals erred in overruling the twentieth assignment of error, based thereon, as follows:

"*Twentieth Assignment of Error.*

"The court erred in refusing to give charge No. 9 asked for by defendant, as follows: 'If you believe from the evidence that James Ferris and his companions or either of them saw the approaching train and stopped to permit it to pass by, and that thereafter Cass Ferris and William Ashley, without fault of James Ferris, after seeing such train approaching, and without ordinary care, urged the horses upon the track in front of the train, and that under all the circumstances the parties so urging the horses upon the track were negligent, and that such negligence contributed to the injury, and if you believe that the parties so urging said horses on the track in advance of the approaching train did so because under the influence of intoxicating liquor and *was* then and there incapable of directing and controlling a team and wagon as a man of ordinary care and prudence would, and that the said James Ferris knew such fact before taking passage on such wagon, and voluntarily approached the crossing in charge of one of his companions in such condition, then and in that event the negligence of said Cass Ferris and William Ashley would be imputable to said James Ferris, and you will

find a verdict in favor of defendant, even though you should believe defendant's agents were also negligent.'"

282 13. The trial court erred in refusing to give special charge No. 29 asked by defendant, and the court of civil appeals erred in overruling appellant's 29th assignment of error, based thereon, as follows:

"Twenty-ninth Assignment of Error.

"The court erred in failing to give charge No. 29 asked by defendant, as follows: 'Although you should believe from the evidence that the team of Cass Ferris became frightened; that it engaged the attention of Cass Ferris and the deceased, and if you should further believe that the same was caused by a switch-engine standing near the crossing and emitting steam, yet if you further believe that the deceased saw or by the use of ordinary care could have seen such switch-engine, and that they nevertheless undertook to pass in close proximity to said engine, and that thereby such animal became frightened, and so drew their attention that they failed to notice or listen for the approaching train, and that by reason of such failure the injury occurred, then in that event the fact that the animal became frightened will not excuse them from exercising ordinary care to watch for and listen for an approaching train, and if they did so fail and such failure was the cause of the accident, you will find for the defendant.'"

14. The court of civil appeals erred in holding that all of the charges asked by defendant in the trial court, plaintiff in error here, were properly refused because such charges did not recognize the right of plaintiffs to recover, notwithstanding the contributory negligence of deceased, if his peril was discovered in time, by the use of care, to have prevented the accident, the trial court having failed and refused to submit such hypothesis and there being no evidence in the record to justify its submission.

15. The court of civil appeals erred in failing to sustain and in overruling appellant's 21st assignment of error, which is as follows:

"Twenty-first Assignment of Error.

"The court erred in failing to give charge No. 10, asked by
283 defendant, as follows: 'If defendant's employés in charge of the engine saw the wagon in which deceased was riding stop before reaching the railroad, and if it reasonably appeared to them, acting with such reasonable care as would govern a man of ordinary prudence under like circumstances, that such wagon would make no attempt to cross such railroad until after such train had passed the crossing, then you are instructed that it would not be negligence for such employés not to stop such engine.'"

16. The court of civil appeals erred in overruling and failing to sustain appellant's twenty-second assignment of error, which is as follows:

"*Twenty-second Assignment of Error.*

"The court erred in failing to give charge No. 17 asked by defendant, as follows: 'It is not the duty of those in charge of a railway engine to keep a lookout for parties approaching the crossing. It is their duty in approaching a railway crossing to blow the whistle and ring the bell, as charged, and to use reasonable care, and if any person, notwithstanding such signals and care, is discovered on the track at a crossing, to use reasonable care to avoid injuring them, after such discovery, but it is not the duty of persons in charge of the engine to keep a lookout for those approaching the crossing, and a failure to do so does not constitute negligence.'"

17. The court of civil appeals erred in overruling and failing to sustain appellant's twenty-third assignment of error, which is as follows:

"*Twenty-third Assignment of Error.*

"The court erred in failing to give charge No. 20 asked by defendant, as follows: 'If the evidence shows that the deceased, James Ferris, was off the railroad track and out of reach of the train when the place where he was came within view of those in charge of the train, and went upon the track after the train approached so near to him that it could not be stopped by defendant's servants
284 by the use of ordinary care and prudence, using all means used for stopping such train in time to avoid the danger, and that all such means were used at the time, then plaintiffs cannot recover, and you will return a verdict in favor of defendant.'"

18. The court of civil appeals erred in overruling and failing to sustain the twenty-seventh assignment of error herein, which is as follows:

"*Twenty-seventh Assignment of Error.*

"The court erred in refusing to give charge No. 24 asked by defendant, as follows: 'You are instructed that while it is the duty of the servants and agents of a railway company to keep a lookout for obstructions upon its track at crossings and to use ordinary care to prevent collisions thereon, yet it is not their duty to keep a lookout to ascertain whether persons are approaching said crossing- or not, and that if they saw such persons they have the right to assume that they will not undertake to drive upon the track in front of the advancing train, and it is not the duty of those operating such trains to slacken the speed or stop the train for the purpose of permitting such persons to pass over the track; hence, although you should believe that the fireman, J. W. Slocum, saw the deceased, James Ferris, and his companions approaching said crossing in a wagon, and that at said time they were at or upon the approach of said crossing, as testified to by him, then he had the right to assume that they would not undertake to go upon or over such crossing in advance of the approaching engine, and it was not the duty of such engineer and fireman to stop said train or slacken the speed thereof upon that account, and if you believe that after said engine had

approached so near the crossing that the agents of the company were unable to stop the same, that deceased and his companions drove suddenly upon the track in advance of an engine and were struck, and that under all the circumstances they failed to use ordinary care, which failure contributed proximately to the injury, you will return a verdict for the defendant.'"

285 19. The trial court erred in refusing to grant a new trial herein for the reason that the uncontradicted testimony herein shows that the injury complained of was the result of the contributory negligence of deceased, James Ferris, and his companions, Cass Ferris and William Ashley, which was imputable to him, and the court of civil appeals erred in finding that there was any evidence to support the verdict, the uncontradicted testimony showing that the injury was caused by the contributory negligence of deceased and his associates, and in overruling plaintiff in error's first and second assignments of error, based upon said proposition, which are as follows:

"*First Assignment of Error.*

"Said verdict and judgment are contrary to and not supported by the evidence, in this: The evidence shows that the death of the said James Ferris was caused by his own contributory negligence, in that he approached the railroad crossing where the accident occurred, with which he was thoroughly familiar and at a time when he knew the train which struck him was due, in a state of intoxication, and that, although said crossing was so situated that for at least 400 yards a person approaching the same along the route pursued by James Ferris could see at every point along said route a train approaching said crossing from the north for at least a distance of 600 yards, and although the view of said James Ferris of said approaching train was absolutely clear and unobstructed from the time said train was 600 yards distant until it reached said crossing, which plain, clear, and unobstructed view said James Ferris had at every moment during the time he was traversing the 400 yards before reaching said crossing and at the time he entered upon the same, that nevertheless he wholly failed to use either his senses of sight or hearing and wholly failed to stop or to look or to listen before entering on said crossing to ascertain whether any train was approaching, but recklessly and negligently, while under the influence of

286 intoxicating liquors, attempted to cross said track in front of an approaching train, which he either saw, or by the use of ordinary care could have seen, approaching said crossing, and that at the time and place of the accident he wholly failed to use such ordinary care as should govern the actions of an ordinarily prudent man under the same circumstances, which negligence directly and proximately contributed to his injury."

"*Second Assignment of Error.*

"Said verdict and judgment are contrary to and not supported by the evidence, in this: Said evidence shows that the injury com-

plained of was caused by the negligence of Cass Ferris and William Ashley, jointly and severally, which said negligence was imputable to the said James Ferris in this, that at the time and place of the accident the said William Ashley and Cass Ferris were each under the influence of intoxicating liquors to such an extent that they were wholly unable to prudently control said team and drive said wagon or to prudently approach said crossing, all of which said James Ferris knew before taking passage with them in the wagon; that said Cass Ferris and William Ashley were each familiar with said crossing and knew that the train causing the collision was due at or about the time of the collision; that said Cass Ferris, notwithstanding his intoxication, was attempting to drive said wagon, and said Wm. Ashley, notwithstanding his intoxication, was attempting to participate therein, all of which deceased well knew at the time he took passage in said wagon and before and at the time he undertook to pass said crossing; that the said Cass Ferris and Wm. Ashley, to whose care the deceased had thus voluntarily committed himself, wholly failed to stop or to look or to listen for an approaching train or to use either their senses of sight or hearing, notwithstanding there was no obstruction of any kind to cut off their view of such train for at least 600 yards to the north of said crossing as they entered upon the right of way and upon the approach of said crossing and for several hundred yards upon their route thither, and they, the said Cass Ferris and William Ashley, jointly and sev-
287 erally, failed to act with ordinary care and prudence in undertaking to pass said crossing without stopping or looking or listening for said train, or, if they did see the same, in undertaking to pass over and cross in advance thereof, which negligence proximately contributed to the injury herein complained of, and which by reason of the fact that said deceased was engaged in a joint and common enterprise with said Cass Ferris and Wm. Ashley, and by reason of the fact that he, deceased, had committed himself to their control and carriage well knowing their incapable and intoxicated condition, was imputable to deceased, James Ferris."

Argument.

The evidence without conflict shows that the injury resulted from the reckless and extraordinary negligence of deceased and his associates, who, wild with liquor, drove madly into an approaching train which was in full view and was seen by fifty or sixty persons. The only contention is that the simple declaration of Cass Ferris that he looked and did not see, that he listened and did not hear, presents a conflict of testimony. As said by Judge Sherwood in Payne *v.* R'y, 38 S. W., 311, "Such testimony as this is so contrary to the daily experience of common life, so at war with the conceded and indisputable physical facts in the case, that neither court nor juries can without stultifying themselves yield to it an iota of probative force. It is a proposition too monstrously improbable for rational human belief." We do not wish to extend this application by an argument upon the facts, but it is submitted that the indisputable facts show

without conflict that the accident complained of was the result of contributory negligence the most extraordinary, and that the verdict herein is not only against the great preponderance of the testimony as conceded by the court of civil appeals, but is wholly without evidence to support it.

20. The court of civil appeals erred in overruling appel-
288 lant's fifth assignment of error, which complains of the verdict of the jury in allowing Mrs. Mattie Lee, the married daughter of the deceased, the sum of $250 damages, the said Mrs. Mattie Lee being a married woman, not joined by her husband in this suit and not dependent upon her deceased father for support, the uncontradicted testimony showing that at the time her father was killed she was living with her husband and in nowise dependent upon her father for support.

21. The court of civil appeals erred in overruling and failing to sustain the eighth assignment of error herein, wherein the plaintiff in error complains of the action of the trial court in refusing to take as confessed the *ex parte* interrogatories propounded to plaintiff- Frank Ferris and Sam. Ferris under the provision of chapter 3, title 40, of the Revised Statutes of the State of Texas, and in refusing to sustain appellant's motion that plaintiff Sam. Ferris be not permitted to testify touching the matters inquired about in said interrogatories, as will more fully appear from said assignment, which is as follows:

"*Eighth Assignment of Error.*

"The court erred in refusing to take as confessed the interrogatories propounded to Sam. Ferris and Frank Ferris under the provisions of chapter 3, title 40, of the Revised Statutes, relating to *ex parte* interrogatories, and in refusing to sustain the motion of the defendant that the said Sam. Ferris should not be permitted to testify concerning the matters covered by such interrogatories for the reason that the statute for 1897, forbidding the taking of *ex parte* interrogatories when a corporation is a party, is contrary to and in conflict with the fourteenth amendment to the Constitution of the United States, in this, that it deprives the defendant corporation of the equal protection of the laws, as will more fully appear from the defendant's bill of exceptions No. 2."

22. Plaintiff in error shows to the court that counsel of record for defendants in error are Judge John W. Parker, who resides at Taylor, in Williamson county, Texas, and Hon. Sidney L. Staples,
who resides at Smithville, in Bastrop county, Texas, and that
289 defendants in error reside in Bastrop county, Texas, their post-office being Smithville, in said county.

Wherefore plaintiff in error, The Missouri, Kansas & Texas Railway Company of Texas, presents this its petition for a writ upon the grounds herein stated and relies upon each and every ground herein stated in this application for said writ, and prays that writ of error be granted to the honorable court of civil appeals for the third supreme judicial district, and that upon final hearing hereof by this honor-

able court the judgment of the said court of civil appeals and of the district court of Bastrop county, Texas, be each reversed and this cause remanded to said district court for a new trial.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS,
Plaintiff in Error,
By B. D. ORGAIN & BROWN, LANE & GARWOOD, *Attorneys.*

Endorsed: Appl. No. 2672. M., K. & T. R'y Co. of Tex., plaintiff in error, *vs.* Mrs. Mollie F. Ferris *et al.*, defendants in error. Application for writ of error. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, May 15, 1900. R. H. Connerley, clerk. Filed in supreme court May 15, 1900. Chas. S. Morse, clerk, by F. T. Connerly, dep'y. Refused.

CLERK'S OFFICE, SUPREME COURT.

I, Chas. S. Morse, clerk of the supreme court of Texas, hereby certify that the foregoing twenty-nine pages contain a true and correct copy of the original "petition for writ of error," with endorsements, filed in this court by the Missouri, Kansas & Texas Railway Company of Texas, on the 15th day of May, 1900, in application No. 2672, Missouri, Kansas & Texas Railway Company of Texas *vs* Mrs. Mollie F. Ferris *et al.*

Witness my hand and the seal of said court, at
290 [SEAL.] the city of Austin, this the 6th day of June, A. D. 1900.

CHAS. S. MORSE *Clerk,*
By F. T. CONNERLY, *Deputy.*

(Endorsed:) Appl. No. 2672. The M., K. & T. R'y Co. of Tex. *vs.* Mrs Mollie F. Ferris *et al.* Certified copy of petition for writ of error. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, Jun- 20, 1900. R. H. Connerly, clerk.

Judgment of Supreme Court Refusing Application for Writ of Error.

Rendered May 17th, 1900.

In Supreme Court of Texas, 3rd District.

M., K. & T. R'Y CO. OF TEX.
vs.
MOLLIE F. FERRIS ET AL.

MAY 17TH, 1900.

This day came on to be heard the application of the M., K. & T. R'y Co. of Texas for a writ of error to the court of civil appeals for the 3rd district, and, the same having been duly considered, it is ordered that said application be refused; that the applicant, the Missouri, Kansas & Texas Railway Company of Texas, and its sureties, T. J. Trigg and T. C. Osborn, pay all costs incurred on this application.

I, Charles S. Morse, clerk of the supreme court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by said court on said application for a writ of error.

Witness my hand and the seal of said court this the 17th day of May, A. D. 1900.

[SEAL.]

CHAS. S. MORSE, *Clerk*,
By F. T. CONNERLY, *Deputy*.

(Endorsed:) No. 2672. M., K. & T. R'y Co. of Tex. *vs.* Mollie F. Ferris *et al.* Copy of judgment in supreme court. Application for writ of error refused. Filed in court of civil appeals, 3rd supreme judicial district, May 17th, 1900. R. H. Connerly, clerk.

291 *Bill of Costs in Supreme Court.*

CLERK'S OFFICE, SUPREME COURT.

M., K. & T. R'Y CO. OF TEX. *vs.* M. F. FERRIS ET AL. } No. 2672. Certified Copy Bill of Costs, Supreme Court.

Filing application	$ .50
Docketing petition	.50
Entering appearance of counsel	.50
Filing two briefs	.60
Filing three papers	.90
Entering orders	.50
Entering judgment on application	1.00
Certified copy of judgment	1.00
Taxing costs of application	.50
Certified copy bill of costs	1.00
Total	$7.00

I, Charles S. Morse, clerk of the supreme court of Texas, hereby certify that the above copy of the original bill of costs is true and correct.

Witness my hand and the seal of said court, at Austin, [SEAL.] this the 17th day of May, 1900.

CHAS. S. MORSE, *Clerk*.

(Endorsed:) Application No. 2672. Certified copy bill of costs in supreme court, Austin. M., K. & T. R'y Co. of Tex. *vs.* Mollie E. Ferris *et al.* $7.00. Filed in court of civil appeals, 3rd supreme judicial district, May 17th, 1900. R. H. Connerly, clerk.

292 *Supersedeas Bond.*

Filed June 20th, 1900.

In the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS
vs.
MOLLIE FERRIS ET AL.

Know all men by these presents that we, The Missouri, Kansas & Texas Railway Company of Texas, as principal, and Jno. B. Holloway, Natt Holman, and John Schuhmacher, as sureties, are held and firmly bound unto Mollie F. Ferris, Mattie Lee, Sam. Richard Ferris, Price Franklin Ferris, Mina Katie Ferris, Millie Caldona Ferris, Henry Cordell Ferris, Dovie Emeline Ferris, and Lovie Eveline Ferris in the full and just sum of thirty thousand dollars ($30,000.00), to be paid to the said Mollie F. Ferris, Mattie Lee, Sam. Richard Ferris, Price Franklin Ferris, Mina Katie Ferris, Millie Caldona Ferris, Henry Cordell Ferris, Dovie Emeline Ferris, and Lovie Eveline Ferris, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated on this the 1st day of June, in the year of our Lord one thousand nine hundred.

Whereas lately, at a term of the court of civil appeals for the third supreme judicial district of the State of Texas, at Austin, in a suit depending in said court between The Missouri, Kansas & Texas Railway Company of Texas, as appellant, and the said Mollie F. Ferris, Mattie Lee, Sam. Richard Ferris, Price Franklin Ferris, Mina Katie Ferris, Millie Caldona Ferris, Henry Cordell Ferris, Dovie Emeline Ferris, and Lovie Eveline Ferris, as appellees, a final judgment was rendered against the said Missouri, Kansas & Texas
293 Railway Company of Texas for the sum of ten thousand dollars ($10,000.00), besides interest and costs, in favor of the said Mollie F. Ferris, Mattie Lee, Sam. Richard Ferris, Price Franklin Ferris, Mina Katie Ferris, Millie Caldona Ferris, Henry Cordell Ferris, Dovie Emeline Ferris, and Lovie Eveline Ferris, which judgment was entered on the 21st day of March, A. D. 1900, and the said Missouri, Kansas & Texas Railway Company of Texas having obtained a writ of error and filed a copy thereof in the office of the clerk of said court to revise the judgment against it, as aforesaid, in said suit, and a citation directed to the said Mollie F. Ferris, Mattie Lee, Sam. Richard Ferris, Price Franklin Ferris, Mina Katie Ferris, Millie Caldona Ferris, Henry Cordell Ferris, Dovie Emeline Ferris, and Lovie Eveline Ferris, citing and admonishing them and each of them to be and appear before the Supreme Court of the United States, to be holden in the city of Washington, within thirty days from date thereof, and desires a supersedeas pending a determination of said cause in the Supreme Court of the United States:

Now, therefore, the condition of this obligation is such that if the Missouri, Kansas & Texas Railway Company of Texas shall prosecute said writ of error to effect and answer all damages and costs if it fails to make its said plea good, then the above obligation to be void; otherwise the same shall be and remain in full force and virtue.

THE MISSOURI, KANSAS AND TEXAS
RAILWAY COMPANY OF TEXAS,
By BROWN, LANE & GARWOOD AND
B. D. ORGAIN, *Its Attorneys of Record.*
JNO. B. HOLLOWAY.
NATT HOLMAN.
JOHN SCHUHMACHER.

Examined and approved by me this the 20th day of June, A. D. 1900.

H. C. FISHER,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

294 STATE OF TEXAS, }
County of Fayette. }

I, J. E. Baker, clerk of the district court of Fayette county, Texas, do hereby certify that the said Jno. B. Holloway, Natt Holman, and John Schuhmacher, whose names appears to the annexed bond, are in my opinion good and ample security for the amount therein specified, and that they have property in said county, subject to execution, of a larger amount, and that if said bond was offered to me for approval the same would be accepted and approved.

Witness my hand and seal of office, at La Grange, on this the 1st day of June, A. D. 1900.

[SEAL.] J. E. BAKER,
Clerk District Court, Fayette County, Texas.

(Endorsed:) No. 2356. The Missouri, Kansas and Texas Railway Company of Texas *v.* Mollie Ferris *et al.* Supersedeas bond. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, Jun- 20, 1900. R. H. Connerly, clerk.

Assignment of Error.

Filed June 20th, 1900.

Assignment of error in the court of civil appeals for the third supreme judicial district.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY of Texas
vs.
MOLLIE FERRIS ET AL. } No. 2356.

Assignment of error.

Now comes The Missouri, Kansas & Texas Railway Company of Texas, plaintiff in error in the above entitled and numbered cause, by its attorneys, and prays a writ of error for the removal of
295 said cause into the Supreme Court of the United States, and says that in the record and proceedings in this cause there is manifest error, in this:

First. The court of civil appeals for the third supreme judicial district of the State of Texas erred in overruling and in refusing to sustain as well taken the eighth assignment of error filed in the court below, complaining of the action of the court below in refusing to take as confessed the *ex parte* interrogatories propounded to plaintiff, Sam. Ferris and Frank (Price Franklin) Ferris, under the provisions of chapter 3, title 40, of the Revised Statutes of the State of Texas relating to *ex parte* interrogatories of parties, and in refusing to sustain the motion of defendant that said Sam. Ferris should not be permitted to testify as a witness concerning the matter covered by said interrogatories, the said Frank and Sam. Ferris having failed and refused to make answer to the interrogatories propounded to them by plaintiff in error, defendant in the court below, which assignment is as follows:

"*Eighth Assignment of Error.*

"The court erred in refusing to take as confessed the interrogatories propounded to Sam. Ferris and Frank Ferris under the provisions of chapter 3, title 40, of the Revised Statutes relating to *ex parte* interrogatories, and in refusing to sustain the motion of the defendant that the said Sam. Ferris should not be permitted to testify concerning the matter covered by said interrogatories for the reason that the statute of 1897, forbidding the taking of *ex parte* depositions where a corporation is a party, is contrary to and in conflict with the 14th amendment to the Constitution of the United States in this, that it deprives the defendant corporation of the equal protection of the laws, as will more fully appear from defendant's bill of exception number two."

The statute of the State of Texas (act of Feb. 15th, 1858) regulating the depositions of parties provides that either party to a suit may

propound interrogatories to the opposite party without notice or service of copies, as in case of ordinary witness-, and provides
296 further that in case said party refuses to answer or answers evasively, such interrogatories should be taken as confessed. The legislature of the State of Texas enacted a statute of date April 22nd, 1897, providing that where either party to any suit is a corporation, neither party thereto should be permitted to take *ex parte* depositions. The plaintiff in error, defendant in the court below, propounded interrogatories to Sam. and Frank Ferris, plaintiffs in the court below, which, if taken as confessed, would bar their right of recovery herein. Said parties refused to answer said interrogatories, and when said Sam. Ferris offered to testify as a witness in the case defendant in the court below, plaintiff in error here, moved the court that said interrogatories be taken as confessed against said parties because of their refusal to answer *ex parte* interrogatories regularly issued in manner provided by law and in hands of duly qualified officer, and that the said Sam. Ferris should not be permitted to testify as a witness touching the matter inquired about in said interrogatories; which motion having been by the trial court overruled, the defendant in said court, plaintiff in error in this court, excepted upon the ground that the act of the legislature of Texas of date April 22nd, 1897, refusing to corporations litigant the right to take *ex parte* depositions is contrary to and in violation of the XIV amendment to the Constitution of the United States, and denies to plaintiff in error the equal protection of the law.

Wherefore plaintiff in error says that there was drawn in question herein the validity of a statute of the State of Texas upon the ground that said statute is repugnant to the Constitution of the United States and the decisions of the trial court and of the said court of civil appeals for the third supreme judicial district, and the decision of each of said courts was in favor of their validity, and error is here assigned upon the refusal of said court of civil appeals to hold that said statute of the State of Texas refusing to corporations the right to take *ex parte* depositions is repugnant to the Constitution of
297 the United States, as hereinabove set out.

Wherefore the said The Missouri, Kansas & Texas Railway Company of Texas prays that the judgment and decree of the said court of civil appeals for the third supreme judicial district of the State of Texas be reversed and said cause be remanded for such further proceedings as law and justice may require.

B. D. ORGAIN AND
BROWN, LANE & GARWOOD,
Attorneys for the Missouri, Kansas & Texas Railway Company of Texas, Plaintiff in Error.

(Endorsed:) No. 2356. The Missouri, Kansas and Texas Railway Company of Texas *v.* Mollie Ferris *et al.* Assignment of error. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, Jun- 20, 1900. R. H. Connerly, clerk.

Application for Writ of Error to the Supreme Court of the United States.

Filed June 20th, 1900.

In the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY of Texas
vs.
MOLLIE FERRIS ET AL. } No. 2356.

To any justice of the Supreme Court of the United States or the chief justice of the court of civil appeals for the third supreme judicial district of Texas:

And now comes The Missouri, Kansas & Texas Railway Company of Texas, plaintiff in error, and says that in the above styled and numbered cause, wherein Mollie F. Ferris, Mattie Lee, Sam.
298 Richard Ferris, Price Franklin Ferris, Mina Katie Ferris, Millie Caldona Ferris, Henry Cordell Ferris, Dovie Emeline Ferris, and Lovie Eveline Ferris, and no others, were plaintiffs in the court below and appellees in the court of civil appeals for the third supreme judicial district of Texas, and plaintiff in error, The Missouri, Kansas & Texas Railway Co. of Texas, and no other, was defendant in the court below and appellant in the said court of civil appeals, and

Wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or

Wherein was drawn in question the validity of a statute of or an authority exercised under said State of Texas, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity, or

Wherein any title, right, privilege, or immunity was claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States and the decision was against the title, right, privilege, or immunity specially set up or claimed under such Constitution, treaty, statute, commission, or treaty.

That on or about the 21st day of March, A. D. 1900, the said court of civil appeals for the third supreme judicial district of Texas, at Austin, the same being the highest court of law or equity of the said State in which a decision can be had in said suit, entered a final judgment in said suit in favor of the said Mollie F. Ferris, Mattie Lee, Sam. Richard Ferris, Price Franklin Ferris, Mina Katie Ferris, Millie Caldona Ferris, Henry Cordell Ferris, Dovie Emeline Ferris, and Lovie Eveline Ferris, against this plaintiff in error, The Missouri, Kansas & Texas Railway Company of Texas, all of which will more fully appear from the assignment of error which is filed with this petition; and

Plaintiff in error says that after said judgment was rendered against it, it moved for a rehearing of said cause in the said
299 court of civil appeals for the third supreme judicial district of Texas, which motion was overruled and said rehearing denied, and that

After said motion was by said court overruled, plaintiff in error applied to the supreme court of the State of Texas for a writ of error to said court of civil appeals, which was also denied, and plaintiff's petition for said writ of error to said court was refused; and that

Thereafter plaintiff in error moved for a rehearing in said supreme court of the State of Texas of its said application for writ of error, and moved said court that its judgment denying writ of error in said cause be set aside and a rehearing of its said application granted, and that upon said rehearing said writ of error to the said court of civil appeals be granted; which said application for rehearing was by said supreme court overruled and the issuance of said writ of error again refused.

The residence of the defendants in error above named is in Bastrop county, Texas, and John W. Parker, who resides in the county of Williamson and State of Texas, and whose post-office address is Taylor, Texas, and S. L. Staples, who resides in the county of Bastrop and State of Texas, and whose post-office address is Smithville, in said county and State, are their attorneys of record.

Wherefore this plaintiff in error prays that a writ of error issue in this behalf to the said court of civil appeals for the third supreme judicial district *of Texas* of the State of Texas for the removal of said cause into the Supreme Court of the United States, in order that the errors complained of may be corrected, and also prays for supersedeas, and that the transcript of the record, proceedings, and papers in said cause, duly authenticated, may be sent to the Supreme Court of the United States.

B. D. ORGAIN AND
BROWN, LANE AND GARWOOD,
Attorneys for the Missouri, Kansas & Texas Railway of Texas, Plaintiff in Error.

300 Allowed by—
H. C. FISHER,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District for the State of Texas.

(Endorsed:) No. 2356. The Missouri, Kansas and Texas Railway Company of Texas *v.* Mollie Ferris *et al.* Application for writ of error. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, Jun- 20, 1900. R. H. Connerly, clerk.

Bill of Costs of Court of Civil Appeals.

Filing record	$ .50
Docketing cause	.50
Appearances	1.00

Filing briefs	.80
Filing and entering motion	.70
Orders (8)	4.00
Filing 25 extra papers	2.50
Judgment	1.00
Taxing costs and copy	.50
Mandate	1.50
Recording opinion	3.00
Certified copy bill of costs	.75
Certified copy orders to sup. crt. of Tex	2.00
Notices	4.50
Copies of motion (2)	17.00
Transcript fee to Sup. Crt. of U. S.	165.00
Costs of Supreme Court	7.00
Total	$212.25

301 *Clerk's Certificate.*

Clerk's office, court of civil appeals, at Austin, Texas.

I, R. H. Connerly, clerk of the court of civil appeals for the third supreme judicial district of Texas, hereby certify that the foregoing 300 pages contain true and correct copies of the proceedings had in the district court of Bastrop county, in this court, and in the supreme court of Texas in the cause of The Missouri, Kansas & Texas Railway Company of Texas *vs.* Mrs. Mollie F. Ferris *et al.*, as the same appear from the files of said cause in this court.

Witness my signature and the seal of said court, at office, in the city of Austin, this the 5th day of July, A. D. 1900.

[Seal Court of Civil Appeals of the State of Texas.]

R. H. CONNERLY, *Clerk.*

302 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Mollie F. Ferris, Mattie Lee, Sam. Richard Ferris, Price Franklin Ferris, Mina Katie Ferris, Millie Caldona Ferris, Henry Cordell Ferris, Dovie Emeline Ferris, and Lovie Eveline Ferris, Greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to the writ of error filed in the clerk's office of the court of civil appeals for the third supreme judicial district of Texas, at Austin, wherein The Missouri, Kansas & Texas Railway Company of Texas is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, this the 20th day of June, in the year of our Lord one thousand nine hundred.

H. C. FISHER,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

I, J. W. Parker, attorney for defendants in error, accept service of the above and within citation in error and notice of the writ of error in said cause and waive service of original and copies therein.

JOHN W. PARKER,
Attorney for Defendants in Error.

303 [Endorsed:] No. 2356. The Missouri, Kansas and Texas Railway Company of Texas *v.* Mollie Ferris *et al.* Citation in error. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, Jun- 20, 1900. R. H. Connerly, clerk. Citation in error.

304 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the court of civil appeals for the third supreme judicial district of the State of Texas, at Austin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of civil appeals for the third supreme judicial district of Texas, before you or some of you, being the highest court of law or equity of the said State of Texas in which a decision could be had in the said suit between The Missouri, Kansas & Texas Railway Company of Texas, appellant in said court and plaintiff in error here, and Mollie F. Ferris, Mattie Lee, Sam. Richard Ferris, Price Franklin Ferris, Mina Katie Ferris, Millie Caldona Ferris, Henry Cordell Ferris, Dovie Emeline Ferris, and Lovie Eveline Ferris, who were appellees in said court of civil appeals and defendants in error here, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under the said State of Texas, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity, or wherein any title, right, privilege, or immunity was claimed under the Constitution or treaty or statute of or commission held or authority exercised under the United States and the decision was against the title, right, privilege, or immunity specially set up or claimed under said Constitution, treaty, statute, commission, or authority, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record

and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ of error, so that you have the same in said Supreme Court, at Washington, within thirty days from the date hereof, that the
305 record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this the 20th day of June, in the year of our Lord one thousand nine hundred.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin]

D. H. HART,
Clerk of the Circuit Court of the United States for the Western District of Texas,
By J. W. HANCOCK, *Deputy.*

Allowed by—
H. C. FISHER,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.

306 [Endorsed:] No. 2356. The Missouri, Kansas and Texas Railway Company of Texas *v.* Mollie Ferris *et al.* Writ of error. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, Jun- 20, 1900. R. H. Connerly, clerk.

Endorsed on cover: File No.. 17,834. Texas court of civil appeals, 3rd supreme judicial district. Term No., 349. The Missouri, Kansas and Texas Railway Company of Texas, plaintiff in error, *vs.* Mollie F. Ferris, Mattie Lee, Sam. Richard Ferris, Price Franklin Ferris, Mina Katie Ferris, Millie Caldona Ferris, Henry Cordell Ferris, Dovie Emeline Ferris, and Lovie Eveline Ferris. Filed July 18th, 1900.

No. 349.
Motion to dismiss or affirm &c.

Office Supreme Court
FILED
NOV 19 1900
JAMES H. McKENNEY,

Filed Nov. 19, 1900.

No. 349.

In Supreme Court of United States.

October Term, 1900.

Missouri, Kansas and Texas Railway Company of Texas

vs.

Mollie F. Ferris, et al.

Defendants in Error's Motion to Dismiss Writ of Error or to Affirm Judgment.

J. W. PARKER,
Counsel for Defendants in Error for the purposes of these motions.

AUSTIN EVENING NEWS PRINT

No. 349.

In Supreme Court of United States.

October Term, 1900.

Missouri, Kansas and Texas Railway Company of Texas

vs.

Mollie F. Ferris, et al.

Defendants in Error's Motion to Dismiss Writ of Error or to Affirm Judgment.

Come now the defendants in error herein, by their counsel appearing in that behalf, and move the Court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because the judgment or decree to which the said writ was allowed is the judgment or decree of the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas, being the highest court of law or equity of the State in which a decision could be had in said cause; and while the said judgment or decree determined adversely to the plaintiff in error the question of the federal constitutionality of the amendment of April 22, 1897, of the act of February 15, 1858, regulating the taking of depositions of parties, which provides that either party to a suit may propound interrogatories to the other without notice or service of copies, and, further, that in case the party refuse to answer or answer evasively, the interrogatories shall be taken

as confessed, the amendment providing that where either party is a corporation neither shall have the right to take depositions *ex parte*; the same time there were determined adversely to plaintiff in error other questions raised in the case, which were not federal in character—namely, whether the minor plaintiffs Sam and Frank Ferris, aged respectively 14 and 12 years, who sued by next friend and against whom the interrogatories were asked to be taken as confessed, refused to answer said interrogatories, or, if they did, whether such refusal was willful—the rule in Texas, as laid down by its courts of last resort in construing the said deposition statute, being that in order to entitle a party to have interrogatories propounded to his adversary taken as confessed against him for refusing to answer the refusal must have been willful—and the further question whether infants are within the general terms of the statute; and the decision of said questions favorably to defendants in error is sufficient to sustain the judgment or decree without regard to the Federal question.

Plaintiff in error in its assignment of error presents only the part of the bill of exceptions showing the proceedings had when the court ruled on its motion to take the interrogatories as confessed, which exhibits the federal question, and omits the portion of the bill which shows the facts which would sustain the court's action upon the grounds which were not federal.

The following is the bill of exceptions. From the star to the end is the part presenting the state grounds:

"Plaintiffs introduced as a witness in their behalf Sam Ferris, one of the parties plaintiff herein, and he was duly sworn to testify in this behalf, whereupon the defendant objected to such testimony upon the ground that witness had refused to answer *ex parte* interrogatories propounded to him by defendant, and thereupon defendant offered in evidence the following interrogatories to said Sam Ferris and Frank Ferris, plaintiffs, which were accompanied by commission

regularly issued under the provisions of chapter 3, title 40, of the Revised Civil Statutes, relating to *ex parte* interrogatories, with the certificate of the officer to whom the same had been delivered for taking, that the said party had refused to answer same, said officer being R. J. Griesenbeck, clerk of the district court of Bastrop county, Texas, as follows: (The questions are omitted.) "Which said *ex parte* interrogatories to Sam Ferris and Frank Ferris, parties plaintiff herein, are hereto attached, together with said commission and the return of said officer thereon, certifying the refusal of said parties to answer, as a part of this bill, and marked Exhibit 'A'. And thereupon the defendant moved the court that the said interrogatories be taken as confessed against each of said plaintiffs, Sam Ferris and Frank Ferris, and that the said Sam Ferris should not be permitted to testify upon the propositions covered by such interrogatories.

"That thereupon plaintiffs contended that under the act of the legislature of the State of Texas, approved April 22, 1897, where either party to the suit is a corporation, neither party is permitted to take *ex parte* interrogatories, whereupon the court sustained said contention and overruled the motion of defendant that said interrogatories be taken as confessed against said Sam Ferris, and overruled the motion of defendant that said Sam Ferris be not permitted to testify upon those propositions embodied in the interrogatories above set out. Whereupon the defendant excepted upon the ground that said statute of 1897 is contrary to and in conflict with the fourteenth amendment to the Constitution of the United States, in this, that it deprives the defendant corporation of the equal protection of the laws.

"That thereupon plaintiffs asked permission to introduce testimony to ascertain whether the refusal of the parties Sam Ferris and Frank Ferris was willful. That thereupon it was proven by said Sam Ferris that he was 14 years old and his brother Frank Ferris was 12 years old. That there-

upon the said R. J. Griesenbeck, the officer taking such depositions, testified as follows:

"Q. You are the clerk of this court?

"A. Yes, sir.

"Q. Did you undertake to execute a commission authorizing the taking of the depositions of Sam Ferris and Frank Ferris, parties plaintiff in this suit?

"A. Yes, sir.

"Q. The commission was issued in this court?

"A. Yes, sir.

"Q. Tell the court in your own way how you proceeded about it.

"A. I drove out to the place, about 5 miles, about 4 or 5 miles, and I drove up to the house, and one of the little boys, I don't know exactly whether that is the one or his brother, but one of them, came out to the gate and spoke to me, and I asked him his name, and he said, I think, Sam or Frank Ferris, I don't remember which. I could not say which one it was; it was one of them; it was the smallest one, and I asked him if his brother was there, and he said no, he had gone to the river, and about that time Mr. Klebe Trigg, the owner of the place where they reside, came up the road, and I spoke to him and shook hands with him, and I told him what I came for, and while hitching my horse he invited me in the house, and this little boy had gone off in the meantime, and as we walked up on the gallery to the house the little boy returned with his uncle, S. H. Gillespie, and I then talked to him, and this little boy again left, and while I was sitting there talking to Mr. Gillespie the boy returned with his brother. I told Mr. Gillespie what my business was there, and he said he could not permit me to ask him any question, or that he could (not) permit them to make any answer, and that he did that under instructions of his attorneys.

"Q. What did you do then?

"A. I just left.

"Q. Did you read a single interrogatory to either one of these boys and call upon them to give an answer to it?

"A. No, sir.

"Q. Did either one of them ever refuse?

"A. No, sir; I did not read the interrogatory.

"Q. Did either one of them ever refuse?

"A. No, sir; the uncle refused for them.

"Q. You did not turn and call on them?

"A. No, sir.

"Q. So they never directly refused?

"A. No, sir.

"Q. And you did not read a line to them?

"A. No, sir.

"On cross examination the witness, R. J. Griesenbeck, testified as follows:

"Q. That statement that they refused to answer on the advice of their attorneys that was made in their presence?

"A. Yes, sir.

"On redirect examination the witness, R. J. Griesenbeck, testified as follows:

"Q. About how old was that boy?

"A. Probably about 10 or 11 years old.

"Q. One was that old and how old was the other?

"A. I judged the other one to be about 12 or 13. Mr. Gillespie told me that he had seen no attorney, but that it was told him by Cass Ferris. He stated to me also that he would bring the boys to town that afternoon to see their attorneys, and then if there was no objection, Judge Garwood could ask him what he wanted to.

"Mr. Garwood—I desire to reserve my exception both under the State Constitution and under the fourteenth amendment to the Federal Constitution.

"And the court thereupon overruled the motion of defendant to take the interrogatories above set out as confessed, and thereupon overruled the motion of defendant that the said Sam Ferris should not be permitted to contradict, or

testify upon, the matters embraced in said interrogatories." (Rec. 38-41.)

And the said defendant in error, by counsel as aforesaid, also move the court to affirm the said judgment or decree, because, although the record in the said cause may show that this court has jurisdiction in the premises, yet it is manifest that the said writ of error was sued out for delay only.

Defendants in error pray that the writ of error may be dismissed with costs, or if the court should take jurisdiction then that the judgment be affirmed with ten per cent damages.

J. W. Carter,

Counsel for Defendants in Error for the purposes of these motions.

Office Supreme Court U.S.
FILED
NOV 19 1900
JAMES H. McKENNEY,
Clerk.

No. 349.
Brief of Parker for D. C.

Filed Nov. 19, 1900.

No. 349.

In Supreme Court of United States.

October Term, 1900.

Missouri, Kansas and Texas Railway Company of Texas

vs.

Mollie F. Ferris, et al.

Brief and Argument on Motion to Dismiss Writ of Error.

J. W. PARKER,
Counsel for Defendants in Error.

AUSTIN EVENING NEWS PRINT

No. 349.

In Supreme Court of United States.

October Term, 1900.

Missouri, Kansas and Texas Railway Company of Texas

vs.

Mollie F. Ferris, et al.

Brief and Argument on Motion to Dismiss Writ of Error.

Mollie F. Ferris for her own use, and the use of Mrs. Mattie Lee, and Sam Ferris, Frank Ferris, Myrick Ferris, Caldna Ferris, Henry Ferris, Dovie Emeline Ferris, and Lovie Eveline Ferris, minors, without any lawful guardian of their persons or estates, by their next friend, Mrs. Mollie F. Ferris, sued the Missouri, Kansas and Texas Railway Company of Texas in the district court of Bastrop county for damages for the death of James Ferris, husband of the plaintiff Mrs. Mollie F. Ferris, and father of the other plaintiffs. (Rec. 1.)

The cause was tried at the June Term, A. D. 1899, resulting in a verdict and judgment in favor of plaintiffs against defendant. (Rec. .)

The proof showed that the plaintiffs suing by next friend were aged as follows: Sam Ferris, fourteen years; Frank Ferris, eleven years; Myrick Ferris, eight years; Caldna Ferris, four years; Henry Ferris, two years; Dovie Emeline

Ferris and Lovie Eveline Ferris, two months. (Rec. 76.)

The plaintiff in error (defendant in the court below) propounded interrogatories to Sam and Frank Ferris, plaintiffs in the court below, and placed the same in the hands of an officer, and the officer returned them certifying that the witnesses refused to answer; and when plaintiffs placed Sam Ferris on the witness stand for the purpose of giving his evidence in the case, defendant moved the court that said interrogatories be taken as confessed against said parties, because of their refusal to answer them, and that the said Sam Ferris should not be permitted to testify as a witness touching the matter inquired about in said interrogatories, on the ground that the amendment of April 22, 1897, of the statute regulating the taking of depositions of parties *ex parte*, and which provided that where either party was a corporation neither should have the right to take depositions *ex parte*, was in violation of the fourteenth amendment to the Constitution of the United States, and denied to defendant the equal protection of the law. The court overruled the motion. Thereupon the plaintiffs asked permission to introduce testimony for the purpose of ascertaining whether the refusal of the parties, Sam and Frank Ferris to answer the interrogatories was willful, and thereupon, without objection on the part of defendant, it was proved that the said parties were aged fourteen and twelve years, respectively; that the officer went out in the country to the place where the boys were staying, and there met their uncle, the boys being present; that the officer made known to him his desire to take the depositions of the boys, and the uncle stated that he could not permit him to ask them any questions or them to answer any; that he did not read a single interrogatory to either of the boys and call upon him to answer it, and that neither of them refused to answer—the uncle refusing for them; that the uncle stated "he would bring the boys to town that afternoon to see their attorneys, and then if there was no objection, Judge Garwood could ask him (them) what he wanted to." The

court overruled the motion of defendant to take the interrogatories as confessed, and overruled the motion that the said Sam Ferris should not be permitted to contradict or testify upon the matters embraced in said interrogatories. (See bill of exceptions copied in motion to dismiss writ of error; also Rec. 38, 39, 40, 41.)

Article 2293 of the deposition statute, which is the same as section 3 of the act of February 15, 1858, is as follows: "Either party to a suit may examine the opposing party as a witness, upon interrogatories filed in the cause, and shall have the same process to obtain his testimony as in the case of any other witness, and his examination shall be conducted and his testimony received in the same manner and according to the same rules which apply in the case of any other witness, subject to the provisions of the succeeding articles of this chapter."

Article 2297, which is the same as section 5 of the said act, and under which the interrogatories were asked to be taken as confessed, is as follows: "If the party interrogated refuses to answer, the officer executing the commission shall certify such refusal, and any interrogatory which the party refuses to answer, or which he answers evasively, shall be taken as confessed."

Article 2293a, which is the amendment of April 22, 1897., is as follows: "Where either party to any suit is a corporation, neither party thereto shall be permitted to take *ex parte* depositions."

The plaintiff in error makes but one assignment of error, which is as follows: "First: The court of civil appeals for the third supreme judicial district of the State of Texas erred in overruling and in refusing to sustain as well taken the eighth assignment of error filed in the court below, complaining of the action of the court below in refusing to take as confessed the *ex parte* interrogatories propounded to plaintiffs Sam Ferris and Frank (Price Franklin) Ferris, under the provisions of chapter 3, title 40, of the Revised Statutes of the State of Texas, relating to *ex parte* interroga-

tories of parties, and in refusing to sustain the motion of defendant, that said Sam Ferris should not be permitted to testify as a witness concerning the matter covered by said interrogatories, the said Frank and Sam Ferris having failed and refused to make answer to the interrogatories propounded to them by plaintiff in error, defendant in the court below, which assignment is as follows:

Eighth Assignment of Error.

"The court erred in refusing to take as confessed the interrogatories propounded to Sam Ferris and Frank Ferris under the provisions of chapter 3, title 40, of the Revised Statutes, relating to *ex parte* interrogatories, and in refusing to sustain the motion of the defendant that the said Sam Ferris should not be permitted to testify concerning the matter covered by said interrogatories, for the reason that the statute of 1897, forbidding the taking of *ex parte* depositions where a corporation is a party, is contrary to and in conflict with the 14th amendment to the Constitution of the United States, in this: That it deprives the defendant corporation of the equal protection of the laws, as will more fully appear from defendant's bill of exception number two."

Defendants in error, in opposition to the said ground of error and in support of their motion to dismiss the writ of error, make the following propositions:

I.

The bill of exceptions shows that Sam and Frank Ferris, the minor plaintiffs, did not refuse to answer the interrogatories. The officer in whose hands the interrogatories were placed testified that he did not call upon either of the boys to answer, and that neither refused to answer—he claiming their uncle refused for them. The rights of the boys could not be prejudiced by any thing their uncle did. Even their

next friend was powerless to do anything to the prejudice of their rights.

Kingsbury vs. Buckner, 134 U. S., 680.
14 Ency. of Pl. and Pr., 1035.

II.

However, if it should be held that the refusal of the uncle to permit the minors to answer the interrogatories was equivalent to their refusing to answer them, defendants in error say that the rule in Texas is that, in order for *ex parte* interrogatories to be taken as confessed for refusal to answer, the refusal must be deliberate and willful; and in this case the refusal was for time to consult the parties' attorneys, the promise being distinctly made that they would answer if their attorneys had no objection. It has many times been held by the courts of last resort in Texas that a refusal to answer until the party could consult with his counsel was not contumacious, and afforded no ground for taking the interrogatories as confessed.

Bounds vs. Little, 75 Texas, 318, 319.
Robertson vs. Melasky, 84 Texas, 561.
Wofford vs. Farmer, 90 Texas, 655.
McLaughlin vs. Carter, 13 Civ. App., 699, 700.

The latest utterance by the Texas Supreme Court on the point is in Wofford vs. Farmer, *supra*, where this language is used:

"The statute gives a party to whom interrogatories are propounded by his adversary the right 'in answer to the questions propounded, to state any matter connected with the cause and pertinent to the issue to be tried.' (Revised Statutes, Art. 2296.) Consultation with his counsel is necessary to a judicious exercise of this right. The privilege given by the statute to a party to a suit to propound interrogatories to the opposite party for the purpose of discover-

ing evidence is an important one; but in our opinion was not given for the purpose of entrapping his adversary, and hence the latter should not be denied the right of consultation with his attorney. A refusal to answer without giving a reasonable time for such consultation should not be deemed contumacious, and a certificate made under such circumstances should, upon a proper motion supported by proof of the facts, be suppressed."

In some of the cases, as in Wofford vs. Farmer, a motion would be made *in limine* to suppress the interrogatories, and the court would hear evidence as to the willfullness of the party in refusing to answer and rule upon the question in advance of the hearing on the merits. In Bonds vs. Little, *supra*, the inquiry as to whether the refusal was willful was entered into without objection during the progress of the trial, and it was held that the court after hearing the evidence could refuse to permit the interrogatories to be read to the jury as confessed—and this was the course taken on the trial of this case. The following is the language of the supreme court: "In this case, however, the record does not show that any objection was made to entering upon the inquiry as to the truth of the certificate during the progress of the trial. We think, therefore, that the court after hearing the evidence should have refused to permit the interrogatories to be read to the jury, and should then have allowed the defendant the opportunity of answering them."

The conduct of the minor parties was what might have been expected of boys of their ages. They were staying at their uncle's house and were under his care, and it could not be expected that they would overrule him and answer against his will. The facts attending the effort of the officer to take the depositions, which are undisputed, make it clear that the minors exercised no volition of their own, and the law could not, therefore, impute to them any willfulness, which according to the establised rule in Texas it must have done before the interrogatories could be taken as confessed.

III.

Another reason why the interrogatories should not have been taken as confessed against the minor parties is that their answers were attempted to be taken without the consent or knowledge of their next friend. It is true that the bill does not affirmatively so state, but its language leaves no room to doubt that such was the case.

From the earliest time in Texas to the passage of the act of August 15, 1870, a minor without a guardian had to sue by next friend.

Cannon vs. Hemphill, 7 Texas, 201.
Robson vs. Osborn, 13 Texas, 305.

In the first case cited it is said: "It seems that a *prochein ami* for an infant was not known before the statutes of Westminster, passed in the reign of Edward the First; and though this statute was not introduced by the adoption of the common law, yet upon the introduction of that system, the rule, under the statute, seems immediately to have been carried out in practice; and this has continued for such period of time, and been sanctioned by such general usage, that it would seriously endanger the multiplied rights growing up and settled under such rule were it now declared to be unauthorized by law." (p. 201.)

This decision was made in 1851.

The only change which the act made was to require that in suits by a minor who had no regular guardian the court should appoint a special guardian "to take care of the interests" of the minor, and that he should take an oath and give bond for the faithful performance of his duty.

The same act defined who were minors, as follows: "Male persons under twenty-one years of age, and females under twenty-one years of age and unmarried are minors." (Sec. 305.)

The act also contained this provision. "The law supposes that minors, persons of unsound mind, and habitual drunk-

ards have not capacity to take care of their persons or estates. It therefore provides that there shall be certain persons whose duty it shall be to take care of them." (Sec. 307.)

By the adoption of the Revised Statutes of 1879 the act was repealed in so far as requiring the appointment of special guardians was concerned, and the right of a minor to sue by next friend was thereafter recognized.

Evansich vs. G., C. & S. F. Ry. Co., 57 Texas, 126.
Abrahams vs. Vollbaum, 54 Texas, 227.

On February 11, 1893, the Legislature of Texas passed an act providing that "any minor having a sufficient cause of action, and who has no legal guardian, can bring suit in any of the courts of this state by next friend, and such next friend shall have the same rights concerning such suit and the matter therein involved as if he were guardian of such minor." (Art. 3498*u*, Revised Statutes of 1895.)

This act was in force when the suit was brought.

Respecting the rights of a guardian concerning a suit for his ward, Art. 2623 of the Revised Statutes of 1895, which was passed as section 76 of the act of 1876, provides that the guardian of the estate of a minor shall have the right "to bring and defend suits by or against him."

Art. 1197, which was passed as section 44 of the act of May 13, 1846, provides that, "suits for the recovery of * * * damages * * * may be instituted by executors, administrators or guardians appointed in this state, in like manner as they could have been by their testator or intestate, and judgment in such cases shall be as conclusive as if rendered in favor of or against such testator or intestate," etc.

These articles, which are still in force, clearly give a minor the right to sue by next friend and vest in the next friend power to control the action and represent the interests of the minor.

To permit an adult party opposed to a minor party to

deal directly with the minor, as was attempted in this case, would prevent the next friend from performing the duty enjoined upon him by the statute law of the state and deprive the minor of the advice and protection which the law intends thereby to secure to him.

The very provision of the deposition act, too, made it the duty of the plaintiff in error to make known to the next friend its purpose to propound interrogatories, because if the minors were legally bound to answer them they had the right "to state any matter connected with the cause and pertinent to the issue to be tried." The judicious exercise of this right required the use of discretion, which is the thing the law made it the duty of the next friend to supply. The very aim of the law in appointing a next friend is that he shall exercise discretion for the minor party.

14 Ency. of Pl. and Pr., 1003.

While it is believed that it is hereinafter shown that minor parties are not within the terms of the deposition statute, if it should be held that they are, then the next friend ought to have been given an opportunity to advise them as to whether they should answer or refuse to answer; and had the next friend been given this opportunity it might be she would have advised that they answer, in which event plaintiff in error would have had no ground of complaint. It is true, it appears that the uncle stated that he was told by Cass Ferris that the attorneys advised that the parties should not answer. The statement was purely hearsay and ought not to be binding upon the minor parties. But, taking it as true, it fairly appears from the bill that it was a general caution and had no reference to the particular interrogatories. But, even if it could be construed as relating to the particular interrogatories, it was advice that was entirely consistent with the right of the parties to have time to consult their counsel, and the inference is not unwar-

ranted that if any such advice was given it was with that view. The uncle proposed to take the boys to town to see their attorneys and then that they would answer if there was no objection. If the attorneys had given peremptory instruction not to answer at all, and the uncle was acting under such instruction, it is hardly probable he would have made the proposition. But be this as it may, if the minor parties were competent to bind themselves by refusal to answer, they were competent to couple with the refusal a request for time to consult their counsel; and this, on the authority of Wofford vs. Farmer, *supra*, would save them from contumacy and deprive their adversary of the right to have the interrogatories taken as confessed.

If plaintiff in error had obtained a release from the minor parties of their right of action against it, under the same circumstances the court would not have held them bound thereby. The reason would have been that being minors they could not legally bind themselves by any such act. In Texas, minors can only bind themselves by contract for necessaries. Why, therefore, should not the same rule apply to a refusal to answer *ex parte* interrogatories?

If a minor has not capacity to bind himself by contract, on what principle ought he be held bound for refusing to answer such interrogatories? Certainly only upon some procedure taken in strict compliance with law. Can it be said that such procedure was taken by plaintiff in error in view of the fact that it ignored the next friend, who was charged with the duty of caring for the interest of the minors? It would seem not.

Here the plaintiff in error is seeking to defeat altogether the right of action of the minor parties because of their alleged refusal to answer the *ex parte* interrogatories; and it ought not to be allowed to succeed except upon a clear showing that it proceeded in strict accordance with law, and that the minors had the full protection which the law guaranteed to them.

IV.

When the minors were made parties to the suit they became "wards of the court," and the court would exercise its jurisdiction for their protection and benefit.

Brooke vs. Clark, 57 Texas, 111.
Moore vs. Moore, 4 Sandf, 44,
Bank of U. S. vs. Ritchie, 8 Peters, 143.
Bispham's Principles of Equity (3d Ed.), Sec. 541 *et seq.*
3 Pom. Eq. Jur., Sec. 1035.

The courts of Texas possess and exercise full chancery jurisdiction.

Revised Statutes of 1895, Art. 1107.
Grassmeyer vs. Beeson, 18 Texas, 766.
Simpson vs. Huston, 14 Texas, 481.
Brooke vs. Clark, 57 Texas, 111.

The district court, in the exercise of its inherent chancery jurisdiction, had power to refuse to allow the interrogatories to be taken as confessed. And if any predicate had to exist for its exercise other than the mere fact that the minors were wards of the court, the ignoring of the next friend in the effort to propound the *ex parte* interrogatories would be all sufficient.

V.

Minor parties to a suit are not within the terms of the statute relating to the taking of *ex parte* depositions of parties.

The article (2297) requires as a condition precedent to taking the interrogatories as confessed, that the party interrogated shall refuse to answer or answer evasively. This must mean that the party has the discretion which the law requires a person to have in order to conduct a suit. An interpretation which would exclude the idea of the party's having such discretion would make the statute embrace idiots, lunatics and persons *non compos mentis*, for they may be

parties to a suit. Certainly it will not be contended the legislature meant to include such parties. But if they are to be excepted, then infants for the same reason must be excepted, because they are "not considered as having sufficient discretion to conduct a suit in person."

Act of 1870, Sec. 307, quoted above.
Articles 3498u and 1210, Revised Statutes of Texas, 1895.
G., C. & S. F. Ry vs. Styron, 66 Texas, 425.
14 Ency. of Pl. and Pr., 1003, and note 1.

Article 2296, already referred to, in the provision giving the party interrogated the right, in answer to questions propounded, to state any matter connected with the cause and pertinent to the issue to be tried, bears out the construction contended for.

An infant party is not supposed to know what are the matters connected with the cause and pertinent to the issue to be tried. Only persons *sui juris* are presumed in law to know this.

The Revised Statutes of Texas, 1895, are very full in their provisions for the protection of infants in their property rights.

An infant possessed of an estate must have a guardian (Art. 2594), who "is entitled to the possession and management of all property belonging to the ward; to collect all debts, rents, or claims due such ward; to enforce all obligations in his favor; to bring and defend suits by or against him." (Art. 2623.)

If the minor has a cause of action, and no guardian of his estate, he may sue by next friend, who has the same rights as a guardian. (Art. 3498u.)

If the minor is sued, and has no guardian within the state it is the duty of the court to appoint a guardian *ad litem* for him. (Art. 1210.)

Can it be that the legislature, after taking such care to safeguard the rights of a minor, intended, in case he should

be made a party to a suit in which they were involved, to expose him to the hazard of losing them through the statute in question?

Again, to embrace minors within the terms of the deposition statute would limit the courts in the exercise of their chancery powers for the protection of infants, and it is not reasonable to suppose the legislature intended by the adoption of the statute to restrict the jurisdiction of the courts.

Re Frits et al., 2 Paige Ch. 375, 379.

In the case of the Lessee of Brewer vs. Blougher, 14 Peters, 198, referring to the duty of courts to restrict the meaning of a statute, it is said:

"It is undoubtedly the duty of the court to ascertain the meaning of the legislature, from the words used in the statute, and the subject matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it."

The Supreme Court of Texas, in a case involving the rights of a minor and the application of general statutes to minors, have recently made a decision which strongly supports the construction contended for by defendants in error.

Walker vs. Rogan, Commissioner, 93 Texas, 251-254.

The question in the case was, whether a minor could purchase school land under certain acts of the legislature which were general in character. The court, holding that a minor was not within the purview of the acts, used this language: "Statutes general in their language have often been held inapplicable to minors because the things required or permitted were such as, by general principles, minors were incapacitated from doing" (p. 254)—citing Farris vs. Richardson, 6 Allen, 121.

The deposition statute belongs to the class of general statutes mentioned in the opinion.

The cases of Moore vs. Moore, 4 Sandf. Chancery, 43, 44, 45, and Mayor vs. Collins, 24 Q. B. Div., 361, are directly in point.

In Moore vs. Moore, after stating that the "general rule is * * * * that one defendant may examine as a witness, in his own behalf, another defendant who is not interested in the question to which he is called," it is said:

"Is an infant within the general rule? An infant's admissions may be proved against him, but they are to be cautiously weighed with reference to his age and understanding.

"Here the infant could not be compelled to testify. The officer appointed by the court to watch over his interests in the suit objected to his being examined. If these defendants had sought to compel him to testify by a cross-bill, the court would not have permitted him to answer on oath; and if he had inadvertently admitted their allegations, they would not be entitled to any relief upon such admission.

"The court was bound to see that an infant litigant's rights and interests are protected. It will not suffer him to make a discovery in the suit, nor to affect his rights by any admission contained in his answer. When there is a discretion to be exercised for him or affecting his interests, the court appoints a suitable person or refers it to a master, to execute such discretion. In short, it protects him against his own immature judgment and improvident conduct, as well as against the acts and designs of others.

"For these positions, I refer to a few of the numerous authorities, viz.: Napier vs. Effingham, 2 P. Wms., 403; Wrottesley vs. Bendish, 3 P. Wms., 237; Legand vs. Sheffield, 2 Atk., 377; Bulkley vs. Van Wyck, 5 Paige, 536; Stephenson vs. Stephenson, 6 Paige, 353; Bing. Inf., 114–121. In Serle vs. St. Eloy, 2 P. Wms., 386, the Master of the Rolls refused to act on an admission made against her interest in a bill filed by an infant, and directed the cause to stand over so that the bill might be amended. And see

Lady Effingham vs. Napier, 3 Bro. P. C., 301. Lord Thurlow, it is true, allowed the infant's guardian *ad litem* to be examined as a witness; but the report does not show whether it was in favor of the infant or against him. (Walker vs. Thomas, 2 Dick, 781.) In any event he, as guardian merely, had no interest in the event of the suit. The argument is plausible, that an infant ought to be permitted to tell the truth, even when it is against his own interest. And the argument would be equally cogent, to allow a complainant to compel an infant who is eighteen or twenty years of age to answer his bill on oath and be bound by his discovery. But so long as the court undertakes to protect the rights of infants,—shielding them from discovery, exercising all discretion for them, and precluding them from influencing their interests, either by their acts or their admissions in pleading,—I think it would be subversive of the principles upon which the court thus proceeds, to suffer an adult defendant, by any inducements, whether of persuasion or of threats to obtain an infant's consent to appear and testify as a witness against his own interest, in a cause where he is a party.

"I do not say that in every such case the adult defendant shall be inflexibly precluded from obtaining testimony from an infant co-defendant; but I am entirely satisfied that it should not be permitted except by the special order of the court, made upon a full understanding of all the circumstances."

In Mayor vs. Collins, which was an "Appeal against the order of a master in an action for libel, giving the defendant leave to deliver interrogatories for the examination of the plaintiff, an infant suing by his next friend," it is said by A. L. Smith, J.: "I am of the same opinion. The learned counsel for the plaintiff has convinced me that, for whatever reason, it was not the practice of the Court of Chancery to allow interrogatories to be administered to infant plaintiffs or defendants. I was struck by the observations which were made upon the anomalous results of the rule, but there

is nothing to show that it has been altered by the judicature acts. It is true that the language of the Order XXXI N. 1, 'the plaintiff or defendant may * * * * deliver interrogatories for the examination of the opposite parties' is perfectly general, but it must obviously be read in connection with that of other rules which relate to parties under disability."

Respecting what is said in the quotation from Moore vs. Moore, *supra*, to the effect that a court will not suffer an infant to make a discovery, it has been held by the Texas Supreme Court that the proceeding authorized by the deposition statute is in the nature of a bill of discovery, and was "intended to answer the same purpose."

Love vs. Keowne, 58 Texas, 197.
Cargill vs. Kountze, 86 Texas, 395.

To construe the statute so as to defeat the right of action of the minor parties as is attempted to be done in this case, would be a reproach upon the law and as well upon the justice of the state.

In Bispham's Principles of Equity it is said: "It is essential to every well ordered social system that there should exist some judicial authority by which protection may be afforded to those who cannot protect themselves; in other words, that there should be some tribunal whose duty it is to supervise the care of the persons and estates of infants, idiots and lunatics." (Sec. 541.) Certainly it cannot be maintained that Texas' courts are without such authority.

Believing that it has been shown that the judgment of the court below can be sustained upon grounds which are not Federal in character, defendants in error submit that the writ of error ought to be dismissed.

On the point that this court will dismiss a writ of error to a judgment of a State court, although the judgment decided a federal question adversely to the plaintiff in error, where

another question, not federal, was raised and decided against him and which was sufficient to sustain the judgment:

Harrison vs. Morton, 171 U. S., 46, 47.
Chappell Chem. & Fert. Co. vs. Sulphur Mines Co., 172 U. S., 471.
Pierce vs. Somerset Ry., 171 U. S., 648, 649, 650.
Egan vs. Hart, 165 U. S., 191.
Eustis vs. Bowles, 150 U. S., 366, 370.

In the first case cited, this language is used: "It is manifest that the pleadings of the parties presented for decision other questions besides Federal ones, and which could be, independent of the Federal ones, determinative of the controversy. Assuming, therefore, that a Federal question was involved, it does not appear but that the decision was given on the contention of the defendant that the agreement never became operative for want of delivery. This contention was clearly presented by defendant's prayers, and they contained the only rulings urged upon the court in that way, that is, in the nature of instructions.

"They were given and the verdict was generally for the defendant. It is, therefore, natural to presume that the verdict was rendered on account of them and on the ground urged by them. The ruling of the court granting them was sustained by the supreme court of the state. It affirmed the ruling as correct in law and as supported by competent testimony. The supreme court, it is true, passed on other grounds, passed on the one which it is claimed involved a Federal question, and decided it adversely to plaintiff. But the rule in such cases has been repeatedly declared by this court. It is not necessary to review the decisions. That has been done by Mr. Justice Shiras in Eustis vs. Bolles, 150 U. S., 361. It is sufficient to announce the rule pronounced in the case:

"'It is settled law that, to give this court jurisdiction of a writ of error to a state court it must appear affirmatively,

not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. (Murdock vs. Memphis, 87 U. S.; 20 Wall., 590; Cook County vs. Calumet & Chicago Canal & D. Co., 138 U. S., 635.) It is likewise settled law that, where the record disclosed that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised, and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment.'"

It follows from what precedes that the court below could have sustained the plaintiff in error's contention that the amendment of April 22, 1897, was unconstitutional, and still have denied the motion to take the interrogatories as confessed, on the ground that the minor parties were *non sui juris*, and therefore not within the purview of the statute, that they did not refuse to answer, or, if they did, that their refusal was not willful and that this court is without jurisdiction.

As to the motion to affirm because the writ of error is manifestly sued out for delay, defendants in error submit that the contention that the amendment of April 22, 1897, is violative of the Fourteenth Amendment of the Constitution of the United States and denies to plaintiff in error the equal protection of the law, and that it is entitled to have the interrogatories propounded to the minor parties taken as confessed for their refusing to answer, is frivolous.

That a corporation generally acts through agents and servants, who have no power to speak for it, and its corporate officers, as a rule, have no personal knowledge of the acts or omissions of the agents and servants, which furnish

the foundation of suits against it, is a sufficient basis for the enactment of the statute.

A., T. & S. F. Ry. Co. vs. Matthews, 174 U. S., 97, *et seq.*
Magoun vs. Illinois Trust and Savings Bank, 170 U. S., 293, *et seq.*

The statute operates the same upon the citizen who is a party to a suit against a corporation, thus securing uniformity and equality, and for this reason is not unconstitutional.

Mo. Pac. Ry. Co. vs. Mackey, 127 U. S., 207, 208.

The Supreme Court of Texas has distinctly held the statute not to be obnoxious to the Fourteenth Amendment.

H. & T. C. Ry. Co. vs. Stewart, 92 Texas, 546.
For the opinion of the Court of Civil Appeals in the case, see 48 S. W. Rep., 804.

The truth is, the amendment was necessary to place the citizen litigating with a corporation upon an equal footing with it, and this is the aim of the Fourteenth Amendment.

H. & T. C. Ry. Co. vs. Stewart (Ct. Civ. Apps.), 48 S. W. Rep., 804.

John W. Pa

Counsel for Defendants in Error.

No. 349.

In Supreme Court of United States

October, Term 1900.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS.

vs.

MOLLIE F. FERRIS, ET AL.

BRIEF OF PLAINTIFF IN ERROR REPLYING TO MOTION TO DISMISS OR AFFIRM.

This proceeding in error seeks to question the validity of an Act of the Legislature of the State of Texas of date April 22nd 1897, which refuses to corporations litigant the right to take the ex-parte depositions of an adversary under the provisions of the law, and with like rights and privileges accorded to other suitors, upon the ground that said statute denies plaintiff in error the equal protection of the law, and is therefore in conflict with the Fourteenth Amendment to the Federal Constitution. It is admitted by the motion and brief of defendants in error that the federal question was properly raised and preserved throughout the various stages of the litigation. Under the laws of the State of Texas as they had existed prior to the Act of April 22nd 1897, either party to a suit could take the depositions of the opposite party upon interro-

gatories filed in the cause. These interrogatories could be leading in their character, no notice of their filing was required, or service of copies, the examination was ex parte, and if the party refused to answer or answered evasively they were taken as confessed against him. These provisions are found in the Act of Feb. 15th 1858, as set out in Chapter Three, Title Forty of the Revised Statutes of 1895, and are as follows:

Article 2293. Either party to a suit may examine the opposite party as a witness, upon interrogatories filed in the cause, and shall have the same process to obtain his testimony as in the case of any other witness, and his examination shall be conducted, and his testimony received, in the same manner and according to the same rules which apply in the case of any other witness, subject to the provisions of the succeeding articles of this chapter.

Article 2294. It shall not be necessary to give Notice of the filing of the interrogatories or to serve a copy thereof upon the opposite party, before a commission shall issue to take the answers thereto, nor shall it be any objection to the interrogatories that they are leading in their character.

Article 2295. A commission to take the answers of the party to the interrogatories filed shall be issued by the clerk or justice, and shall be executed and returned by any authorized officer as in other cases.

Article 2297. If the party interrogated refuses to answer the officer executing the commission shall certify such refusal, and any interrogatory which the party refuses to answer, or which he answers evasively shall be taken as confessed.

The act of 1858, is substantially the same as that of May 13th 1846 (Hartley's Digest Art. 736 p. 254) which is as follows:

Be it further enacted that the party interrogated shall answer under oath, and categorically each of the questions put to him, unless he can not do so without criminating himself, and if he refuse or neglect to do, the facts concerning which he shall have so refused or neglected to answer shall be taken as confessed.

These statutes have been upheld, and applied from the earliest days to the present both as to persons, (Pool vs. Pickett 8 Tex. 121; Teal vs. McDonald 13 Tex. 349; Meyer vs. Claus 15 Tex. 517; Blackman vs. Green 17 Tex. 322; Friend vs. Miller 62 Tex. 177) and as to corporations, (G. C. & S. F. Ry. vs. Nelson 5 T. C. A. 388; H. & T. C. Ry. vs. Reason 61 Tex. 613).

On April 22nd 1897 (See Acts of 25th Leg. 117) an act was passed adding to the Statutes Article 2293a which is as follows:

"Where either party to a suit is a corporation, neither party thereto shall be permitted to take ex parte depositions."

On January 28th 1899 James Ferris, was killed on a crossing by a locomotive of the plaintiff in error, a railroad corporation. On January 31st 1899, the heirs of said James Ferris among whom are Sam Ferris, and Frank Ferris, his sons, filed this suit, for their damages by reason of his death. On June 20th 1899, there was judgment for plaintiffs (defendants in error) for sum of ten thousand dollars of which $900.00 was apportioned to said Sam Ferris and $1000.00 to said Frank (Price Franklin) Ferris. (Tr. pps. 35—36).

On the 12th day of May 1899, prior to the trial, plaintiff in error, propounded to said Sam Ferris and Frank Ferris ex parte interrogatories under the statutes above quoted, so framed that if taken as confessed, their right of recovery would be precluded. Commission was regularly issued with the interrogatories attached and placed in the hands of a competent officer. They each refused to answer, and the officer so certified, and filed said interrogatories, commission and certificate in the papers of the cause on May 20th 1899. No motion was made to suppress the same. Upon the trial plaintiffs in the court below, defendants in error here, offered as a witness the said Sam Ferris. The company objected to his testimony upon the ground that he had refused to answer the interrogatories legally propounded to him, and thereupon offered in evidence the said interrogatories propounded to him and his co-plaintiff Frank Ferris, defendant in error here, together with the certificate of the clerk certifying such refusal, and moved the court first, that said matters enquired about in said interrogatories be taken as confessed against each of said parties Sam and Frank Ferris and that the said Sam Ferris be not

permitted to testify touching the matters covered by such interrogatories. (See Bill of Exception No. 2, pps. 38 and 39 Record). This motion was overruled upon the specific ground that under the act of April 22nd 1897, ex parte depositions could not be taken when either party is a corporation, and plaintiff in error excepted upon the ground that such act was in contravention of the fourteenth amendment to the federal constitution in that it deprived plaintiff in error of the equal protection of the law. This contention was successively made at every stage of the litigation, was decided adversely to plaintiff in error by the Court of Civil Appeals, and a writ of error having been refused by the Supreme Court, writ of error was allowed to the former Court which holds the record.

No question is made of the propriety or relevancy of the interrogatories, nor is the contention made that they embrace such matter as that if taken as confessed against said Sam Ferris and Frank Ferris reversal would not necessarily follow. It will not be necessary, therefore, to encumber the record, with the interrogatories.

The motion to dismiss or affirm is predicated upon two propositions: First that the judgment can be sustained upon grounds not federal in their character; and Second, that the proposition, that a State can not deny to a corporation litigant those remedies, and rights which it confers upon other suitors in like cases, without infringing upon the guaranties of the Federal Constitution is frivolous, and should not abide a regular hearing before the Court.

In reply to the first propositon it is submitted

FIRST:

When the record makes it clear that the judgment of the State Court rests upon the federal question, this Court will not indulge

in conjecture, or speculation, as to whether there may or may not be grounds independent of the federal question, upon which it may sustain the judgment.

In Klinger vs. Missouri 13 Wallace 257, it is said:

"When it appears by the record that the judgment of the State Court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws or treaties of the United States, or upon some other independent ground, and it appears, that the Court did, in fact, base its judgment on such independent ground, and not on the law raising the federal question, this Court will not take jurisdiction of the case even though it might think the position of the State Court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then if the independent ground on which it might have been based, was a good and valid one, sufficient of itself to sustain the judgment this Court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one it will be presumed that the State Court based its judgment upon the law raising the federal question and this Court will then take jurisdicton."

In Neilson vs. Lagow, 12 Howard 110; error to the Supreme Court of Indiana, the federal question relied upon to confer jurisdiction was the construction of an Act of Congress, and it was sought to defeat the jurisdiction by the contention that the State Court might have based its judgment upon other grounds. Curtis J. says:

"If it had appeared affirmatively in the record that the Supreme Court did decide that the deed conveyed only a life estate, this Court would not enquire into the correctness of that decision; but when put to infer what points may have been raised, and what that Court did decide, we can not infer that they decided wrong; otherwise nothing would be necessary in any case to prevent this Court from reversing an erroneous judgment under the twenty fifth section of the Judiciary Act but that counsel should raise on the record some point of local law, however erroneous and suggest that the Court below may have rested its judgment thereon."

In the case at bar it is clear from the record that the trial Court did base its judgment on the federal question, and counsel in order to defeat jurisdiction suggests in argument grounds other than the federal question upon which it might have based same.

We beg to call the Court's attention to the bill of exception p. 39 of the record.

"And thereupon the defendant moved the Court that the said interrogatories be taken as confessed against each of said plaintiffs Sam Ferris and Frank Ferris, and that said Sam Ferris should not be permitted to testify upon the proposition covered by such interrogatories. *That thereupon plaintiffs* contended that under the act of the Legislature of the state of Texas approved April 22nd 1897, where either party to a suit is a corporation neither party is permitted to take ex parte interrogatories; whereupon the Court sustained such contention and overruled the motion of defendant that said interrogatories be taken as confessed against Sam Ferris and Frank Ferris and overruled said motion of defendant that said Sam Ferris be not permitted to testify upon those propositions embodied in the interrogatories above set out. Whereupon defendant excepted upon the ground that said statute of 1897 is contrary to and in conflict with the fourteenth amendment to the Constitution of the United States, in this that it deprives defendant corporation of the equal protection of the laws."

It thus clearly and unmistakably appears first that the act of 1897, was the sole ground urged by defendants in error against the motion of the company, and second that the Court based its judgment solely upon this ground.

After this ruling of the Court had been duly excepted to by the company upon the ground that the statute denied it the equal protection of the laws, defendants in error asked permission to introduce testimony to ascertain whether the refusal of the parties Sam Ferris and Frank Ferris was willful, and thereupon R. J. Griesenbeck the officer commissioned to take their answers testified that when he informed them that he had come to take their answers to the interrogatories they were in the presence of their uncle S. H. Gillespie with whom they were living; that Gillespie then said in their presence that he could not permit him to ask them any questions, or that he could not permit them to answer any question, *and that he did this under instructions of attorneys*, and being thus prevented from taking the answers the interrogatories were

returned into Court. (See pages 39 and 40 of the record). No ruling or finding of the Court is made upon this testimony.

The record then stands thus: The trial court clearly bases its judgment upon the federal question. For this Court to refuse jurisdicton upon the ground that the question can be properly determined by the local law, it will become necessary, for it to do, what the trial court refused to do, to wit: Find *as a fact* that the refusal of the parties was not willful. It is, to put the matter in the light most favorable to the motion, at least a matter of grave doubt, whether any question, other then the validity of the statute of 1897, could or should have entered into the decision. In this state of the case it is submitted that when the State Court clearly bases its judgment upon the federal question, this Court will not assume to decide it upon the other and different grounds unless it clearly appears that the judgment is obviously correct upon other grounds. It is further submitted that when the State Court rests its judgment upon the federal question, this Court will not assume to determine the point upon other and different grounds, dependent upon matters of fact, which the trial court refused to determine; and upon questions of practice, themselves dependent upon decisions of the local tribunals which the trial court did not undertake to interpret or apply. The course followed by defendants in error leaves no doubt upon the matter. They object to the motion of plantiff in error solely for the reason that it contravenes the statute of 1897. The Court having based its judgment solely upon that statute some evidence is introduced, for the purpose as stated, of ascertaining whether the refusal is willful. But no finding or ruling is asked or had from the trial court, upon that matter. No finding or ruling thereon is made by the Court of Civil Appeals. (See opinion page 164 of the record), although that court's findings on matters of fact are final. It is submitted therefore that the

action of the trial court complained of rests wholly upon the federal question and that no question of local law entered into its determination.

SECOND:

For this Court to refuse to entertain jurisdiction upon the ground that the question involved may have been correctly decided under the local law, will compel it to examine and decide a question of fact which the several State Courts declined to do, to wit: It must decide that the refusal to answer was not willful, and this it will not do.

The bill of exceptions clearly shows that the State Court based its action wholly upon the statute and that it made no finding upon the issue of fact. The trial court having once (p. 39) specifically declared that its action was based upon the statute, it is not conceived that it was the duty of plaintiff in error, to ask the Court to negative all other conceivable reasons under the local law, which the ingenuity of counsel can conjure up, which might be urged to sustain its action. The court having once clearly stated the basis of its action if defendants in error wished it to shift its ground, to the position that because the refusal of the parties was not willful the interrogatories ought not to be taken as confessed, there should have been a finding that the refusal was not willful. The finding was not made, and it is submitted that this Court can not make such finding in order to defeat its jurisdiction.

THIRD:

Should the Court deem it proper to consider a question of fact not considered and not decided by the trial court it is submitted that for the trial court to have decided that the interrogatories should not have been taken as confessed under the law as it existed prior to the act of 1897, upon the ground that the refusal to answer was not willful, would have been to decide incorrectly, and

this court, will not indulge in that presumption, but will rather presume, that the decision rested wholly upon the federal question.

Both Frank Ferris and Sam Ferris were witnesses to the transaction, under investigation. The remarkable verdict rendered, which according to the Court of Civil Appeals (see p. 165 of the record) is "against the preponderance of the testimony especially upon the issue of contributory negligence" rests largely upon the testimony of Sam Ferris, Frank Ferris although present (see testimony of Sam Ferris p. 62) is never placed upon the stand, though he is in attendance upon Court nor do either of them ever at any time either offer to answer the interrogatories, or submit any reason for their refusal to answer. Counsel in argument here pleads infancy. Sam Ferris was fourteen years of age and Frank Ferris is ten. No suggestion is made that either by reason of tender years is unable to answer or that he is other than an intelligent and competent witness. The strange contention is made that the refusal is not willful, and yet never at any time is an excuse made for the refusal, none is even proffered, either to the officer undertaking to serve the commission and take the answers, to the trial court, or to this court. They stood upon the Statute of 1897. Acting under the advice of counsel they refuse to answer (p. 40). In the light of these proceedings the contention that the refusal to answer is not willful seems extraordinary. Not only is it willful, but it seems to be the deliberate conception and advice of counsel. At least the parties so conceived and it is not denied in the record by counsel for defendants in error. It is admitted that under the decisions of this State where the refusal to answer is not willful, where there is any sufficient exuse therefor, the interrogatories will not be taken as confessed. Let us examine the cases cited by defendants in error. In Bounds vs. Little 75 Tex. 318, it was shown that the reason that the party did not

answer was that the notary insisted upon the answer yes or no, to questions that did not permit of such answers, that the party declined to answer for that reason, and not willfully; that he told the notary that he could not answer the question yes or no, but that he would be present next day at the trial ready to testify, and that thereupon the notary told him that under the circumstances he would not answer them himself. The Court said:

"To give effect to the law it was provided that upon the refusal of the party interrogated to answer, the interrogatories should be taken as confessed upon the certificate of the officer to that effect. But we apprehend that it was only in cases of a deliberate refusal that this provision was intended to apply. It certainly was not intended that the certificate of the officer should be conclusive in every case. We think therefore that if it be shown that he did not refuse, or that he declined under a mistake as to his rights and not contumaciously, or that the notary induced him to believe that he should not answer, the interrogatories should not be taken as confessed, provided that at the trial he shows that he is willing to answer them."

In Robertson vs. Melaskey 84 Tex. 561, when the notary presented the interrogatories the party asked for time to consult his attorney which was declined and a refusal to answer certified. The party wrote to his attorney who instructed him to answer, and he thereupon went to the notary and offered to answer which was refused him. Under these circumstances it was held that it was error to take the interrogatories as confessed. In Wofford vs. McKinney 90 Texas 655, the party asked time to consult his attorney and to examine his papers which was refused, and the Court held that such refusal of the party to answer was not contumacious and declined to take the interrogatories as confessed. In each case a valid excuse is shown and there is always the offer to answer. Here the parties are informed that they are required to answer. Gillespie, their uncle, informs the officer in their presence, that he will not permit them to hear the interrogatories or answer thereto, and that he did this under the advice of his at-

torneys. They proffer no exuse for not answering, they do not deny that they were so advised by their attorneys, the attorneys do not deny it, they never offer to answer. Frank Ferris is present in Court, and does not take the stand to testify in his own behalf although he was an eye witness, and the case is so weak that the preponderance of the testimony is against the verdict. Neither Frank Ferris or Sam Ferris are shown to be of such low grade of intelligence, as to afford any reason why they should not answer these interrogatories as other parties. In the trial court where it is moved that the interrogatories asked be taken as confessed, they rely wholly upon the statute of 1897. Under these circumstances to contend in this Court that it is obvious that the refusal to answer was other than deliberate and willful is extraordinary, and is an argument of counsel, an afterthought to defeat jurisdiction.

FOURTH:

In answer to the contention that the statute of 1858, does not apply to minors, and that minors under the general law, can not be compelled to make answer to discovery, it is submitted:

1. No Texas Court has held that the statute of 1858, does not apply to minor parties, and this Court to avoid the decision of the federal question, will not place a construction upon the statute not put upon it by the State Courts, such construction not being justified by the terms of the statute itself.
2. While under the peculiar circumstances of special cases courts of equity have relieved infants from making answer to bills of discovery, no text writer, and no decision, lays down the absolute rule, that minors are exempt from discovery, and from the operation of statutes providing for the preliminary ex parte examination of parties to suits. In the case at bar no special circumstance save minority was urged, and it is asked

that this Court find, what the lower Courts did not find, that by reason of such minority the parties should be exempt from answering, which finding of fact, it is believed it will not make.

FIFTH:

A corporation is a "person", entitled to the equal protection of the laws, and when it is denied equal access to the Courts, and equal use of those remedies provided by the laws of the State for other suitors it is denied the equal protection of the laws guaranteed by the XIV. Amendment to the Federal Constitution.

Defendant in support of his proposition that this contention is frivolous cites the case of A. T. & S. F. Ry. vs. Mathews 174 U. S. 97, wherein was sustained a statute of the State of Kansas providing that in actions against railroads for damages from fire, proof that the fire was caused by the railway, and of the amount of damages created a prima facie case against the railway, and if recovery should be had, a reasonable attorneys fee should be allowed. That case rests upon the police powers of the State, and its right to regulate peculiarly hazardous occupation in the interest of the common safety. It will be remembered however that Justices Harlan, Peckham, Brown and McKenna dissented from the decision and Justice Harlan in the disenting opinion declared that upon the principles declared in Gulf, Colorado and Santa Fé vs. Ellis, 165 U. S. 150, the statute was obnoxious to the fourteenth amendment. Candor compels the writer to state that the profession has been ill able to differentiate the two cases, and that if the Texas statute was wrong the Kansas statute could not be right. Be that as it may the Mathews case clearly rests, upon the police power of the state, and therein is found the justification of almost, if not all, of the state legislation hostile to corporate capital, such for example as statutes denying to railroad companies the application of the doctrine of fellow servants

when the servant, was engaged in a hazardous employment. No such principle is involved here. It is a bold and palpable attempt to deny to one class of suitors those remedies and rules of law accorded to all others. Justice Brown said in the Ellis case that "a state has no more power to deny to corporations the equal protection of the laws than it has to individual citizens." Judicial tribunals are provided for the equal protection of every suitor, and when remedies are provided and rights accorded to ordinary suitors which are denied to corporations, a special code is prepared for the latter, and their rights are not determined by the general law of the land. Judge Bradley enumerates in Bowman vs. Lewis 101 U. S. 22 among the rights protected by the fourteenth amendment "the equal right to resort to the appropriate court for redress."

In Dunkee vs. City of Janesville 28 Wisc. the Supreme Court of Wisconsin in overthrowing as unconstitutional a charter granted by statute which provided that no costs should be recovered against the City in suits to set aside a tax assessment or to enjoin the collection of taxes said: The clause "law of the land" is held to mean a general public law, equally binding upon every member of the community * * * * It is obvious there can be no *certain* remedy in the laws when the legislature may prescribe one rule for one class of suitors and another for all others under like circumstances * * * * Certainty of remedy implies uniformity of remedy and equality of rights and privileges in all things respecting it, which can only be obtained by general laws equally binding upon every member of the community."

Justice Field in ex parte Virginia 100 U. S. 367 discussing the Fourteenth Amendment said:

> "And yet the reach and influence of the amendment are immense. It opens the courts of the country to every one *on the same terms, it assures to every one the same rules of evidence and modes of proceedure.*"

Again in Barbier vs. Conolly 113 U. S. 27. this great jurist says:

"The Fourteenth Amendment in declaring that no state "shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws undoubtedly intended not only that there should be no arbitrary deprivation of life, or liberty or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; *that they should have like access to the courts of the country for the protection* of their persons and property."

While no case directly in point has ever been before this court these declarations assert the principle that the protection of the amendment extends to remedies as well as rights, and that one set of remedies for the same rights are not to be prescribed for one class of suitors, and another set for another class, but that all shall be governed by the same general law.

It is argued, however, that inasmuch as the law provides that when a corporation is a party, neither party to the suit shall take ex parte depositions; there is no discrimination since it applies to both parties to the litigation. This argument is well met by the Supreme Court of Mississippi in Chicago. St. L. & N. O. Ry. vs. Moss, 60 Miss. 641—652, which involved the validity of a statute, authorizing the taxing of an attorney's fee against the appelant, "whenever an appeal shall be taken from the judgment of any court in any action for damages brought by any citizen of this state against any corporation."

It will be noted that the provision applied to both parties to the litigation—both citizen and corporation. The court in overthrowing the statute upon the same grounds here insisted upon, says:

"All litigants, whether plaintiff or defendant, shall be regarded with equal favor by the law, and before the tribunals for adminis-

tering it, and should have the same right to appeal with others similarly situated. All must have the equal protection of the law and its instrumentalities. The same rule must exist for all in the same circumstances. There may be different rules for appeals and their incidents in different classes of cases, determined by their nature and subjects, *but not with respect to the person by or against whom they are instituted.* The subjection of every unsuccessful appellant to a charge for the fee of the attorney for the appellee would afford no ground for complaint as unequal, for it would operate on all, and such a rule for the unsuccessful appellant in certain causes of action, tested by the nature and subject of the actions will be equally free from objection, upon the ground of its discriminating character; but to say that where certain persons are plaintiffs, and certain persons are defendants, the unsuccessful appellant shall be subjected to burdens, not imposed upon unsuccessful appellants generally, is to deny the equal protection of the law to the person thus discriminated against. It is an unwarranted interference with the due course of law, prescribed for litigants generally. The act was intended to deter from the appellate courts corporations, against whom judgments should be rendered for damages, or citizens of this state suing them for damages. It was conceived in a spirit of hostility to citizens, as plaintiffs, or corporations, as defendants in such actions. In either view it is partial and discriminating against classes of litigants, denying them access to the appellate courts on the same terms, and with the same incidents as other litigants, who may be plaintiffs or defendants in actions for damages. It is not applicable to all suitors alike in the class of actions mentioned by it. An act, which is partial in its operation intended to deprive particular individuals or corporations of the equal benefits of the general law, is unwarranted and void."

"The equal protection of the laws is a pledge of the protection of equal laws." It is submitted therefore that the act of 1897 is violative both of the letter and the spirit of the Fourteenth Amendment, that by it corporations litigant are denied the rights and remedies, provided for other suitors by the general law, and that thereby plaintiff in error has in this trial been denied the equal protection of the law. It is idle to contend that such a question is frivolous. It is submitted to the Court in the utmost good faith, and it is asked that the motion to dismiss or affirm be overruled, or in the alternative that its final determination be reserved for final hearing upon the merits.

The Missouri, Kansas & Texas Railway Company of Texas,
Plaintiff in Error.

By H. M. Garrett Counsel.

Supreme Court of the United States.

No. 349.—October Term, 1900.

The Missouri, Kansas and Texas Railway Company of Texas, Plaintiff in Error,
vs.
Mollie F. Ferris, Mattie Lee, Sam. Richard Ferris, Price Franklin Ferris, Mina Katie Ferris, Millie Caldona Ferris, Henry Cordell Ferris, Dovie Emeline Ferris, and Lovie Eveline Ferris.

In error to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.

[December 24, 1900.]

This was an action commenced in the District Court of Bastrop County, Texas, on January 31, 1899, by the defendants in error, as plaintiffs, to recover damages sustained by the death of their father, charged to have been occasioned through the negligence of the railway company. Judgment having been rendered in favor of the plaintiffs, it was taken on appeal to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas, and by that court affirmed. An application to the Supreme Court of the State for a writ of error having been denied, this writ of error was sued out.

The case presents these facts: An act of the legislature of the State of Texas, passed February 15, 1858, appearing in chapter 3, title 40, Revised Statutes of 1895, in the following sections reads:

"Article 2293. Either party to a suit may examine the opposite party as a witness, upon interrogatories filed in the cause, and shall have the same process to obtain his testimony as in the case of any other witness, and his examination shall be conducted, and his testimony received, in the same manner and according to the same rules which apply in the case of any other witness, subject to the provisions of the succeeding articles of this chapter.

"Article 2294. It shall not be necessary to give notice of the filing of the interrogatories or to serve a copy thereof upon the opposite party, before a commission shall issue to take the answers thereto, nor shall it be any objection to the interrogatories that they are leading in their character.

"Article 2295. A commission to take the answers of the party to the interrogatories filed shall be issued by the clerk or justice, and shall be executed and returned by any authorized officer as in other cases."

"Article 2297. If the party interrogated refuses to answer the officer executing the commission shall certify such refusal, and any interrogatory which the party refuses to answer, or which he answers evasively, shall be taken as confessed."

On April 22, 1897, this amendment was made:

"Where either party to any suit is a corporation, neither party thereto shall be permitted to take *ex parte* depositions." (Texas General Laws, 1897, p. 117.)

Prior to the trial an effort was made to take the testimony of two of the plaintiffs, Sam Ferris and Frank Ferris, the one 14 years of age and the other 12 years of age. Interrogatories were prepared by the defendant, and the clerk of the court was designated as the officer to take the depositions. On the trial he testified in substance that he went to the place where the boys were living with their uncle; that the uncle refused to permit them to be questioned, though neither of the boys was asked any question or declined to answer any interrogatory. He further testifies that the uncle "told me that he had seen no attorney; . . . that he would bring the boys to town that afternoon to see their attorneys, and then if there was no objection Judge Garwood (counsel for defendant) could ask them what he wanted to."

The trial court overruled the motion of defendant to take the interrogatories confessed as against the two plaintiffs.

Mr. Justice BREWER delivered the opinion of the Court.

This case is before us on a motion to dismiss or affirm. The parties being citizens of the same State, the jurisdiction of this court is invoked on the alleged ground of a Federal question. It is contended that the amendment of April 22, 1897, which takes away in cases in which a corporation is a party on either side the right to preliminary *ex parte* depositions, is in conflict with the Fourteenth Amendment to the Federal Constitution, inasmuch as it is unwarranted class legislation, and denies the equal protection of the laws.

If we examine the opinion of the Court of Civil Appeals, or the proceedings in the Supreme Court of the State, we find no reference to that question. It either was not called to the attention of those tribunals or was unnoticed by them. Turning to the record of the trial in the District Court it appears that when the interrogatories were presented, together with the certificate of the clerk that the two plaintiffs named had refused to answer, the court ruled that the act of April 22, 1897, was constitutional; that, therefore, the defendant had no right to present such interrogatories, and overruled its motion that they be taken as confessed; and that the defendant excepted upon the ground of a conflict between such statute and the Fourteenth Amendment. It further appears that thereupon the plaintiffs asked permission to introduce testimony in respect to such refusal, and the testimony being produced, it was disclosed that the only refusal was

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that of the uncle; that the boys not only did not decline to answer, but were not even asked any of the interrogatories; and that the uncle declared that he would take the boys to town that afternoon to consult attorneys, and then, if there was no objection, the defendant's counsel might ask them what he wished. Upon this testimony the court again overruled the motion of the defendant to take the interrogatories as confessed.

While the court, in the first instance, expressed an opinion that the act of 1897 was constitutional, yet its final ruling was based upon the disclosure made by the testimony. That disclosure was of facts which, under the original statute and irrespective of the amendment of 1897, did not, according to the rulings of the Supreme Court of the State, entitle the defendant to have the interrogatories taken as confessed. In *Wofford* v. *Farmer*, (90 Texas, 651,) it appeared that the notary acting for the defendants, without having given any previous notice, came to the plaintiff and demanded that he should answer the interrogatories; that the plaintiff refused to answer, assigning as a reason that he wished to see his attorneys, and that it was necessary that he should examine some papers before giving his answers. The Supreme Court sustained the action of the trial court in declining to hold the interrogatories taken as confessed, saying (p. 654):

"The statute gives a party to whom interrogatories are propounded by his adversary the right 'in answer to the questions propounded to state any matter connected with the cause and pertinent to the issue to be tried.' (Rev. Stat. Art. 2296.) Consultation with his counsel is necessary to a judicious exercise of this right. The privilege given by the statute to a party to a suit to propound interrogatories to the opposite party for the purpose of discovering evidence is an important one; but in our opinion was not given for the purpose of entrapping his adversary, and hence the latter should not be denied the right of consultation with his attorney. A refusal to answer without giving a reasonable time for such consultation should not be deemed contumacious, and a certificate made under such circumstances should, upon a proper motion, supported by proof of the facts, be suppressed. (*Bounds* v. *Little*, 75 Texas, 316; *Robertson* v. *Melasky*, 84 Texas, 559.)"

The cases cited in this quotation go to sustain the proposition that the refusal of the party to answer must be willful and contumacious. Such being the construction placed by the Supreme Court of the State upon the statute, the trial court properly held that the certificate of the officer to the refusal of the plaintiffs was not conclusive, and that upon the facts as disclosed the interrogatories should not be taken as confessed. Now, whatever may have been the opinion of the trial court as to the validity of the act of 1897, no matter what may have been said in the progress of the trial in respect to its validity, if the final ruling was based upon a state of facts

which put the act entirely out of the case, it cannot be that we are called upon to consider any expression of opinion concerning it, for such expression was not necessary for the decision. Moot questions require no answer.

This being the only matter suggested, and it appearing that the Federal question stated in the record calls for no decision, judgment is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.